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Note

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## **AMERICAN INDIAN SACRED RELIGIOUS SITES AND GOVERNMENT DEVELOPMENT: A CONVENTIONAL ANALYSIS IN AN UNCONVENTIONAL SETTING**

When the Lord saw that Moses had turned aside to look, he called to him out of the bush, "Moses, Moses." And Moses answered, "Yes, I am here." God said, "Come no nearer; take off your sandals; the place where you are standing is holy ground."

-- *Exodus* 3:1-6

[I]n the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people.

-- *Wilson v. Block*<sup>1</sup>

### **INTRODUCTION**

For centuries, American Indians have regarded specific lands as essential to their livelihood, government, culture, and religion. Congress and the courts have at times recognized the important relationship between tribes and their lands.<sup>2</sup> Recognition has not always coincided with protection; during the nineteenth century and part of the twentieth century a series of governmental actions resulted in the tribes surrendering title and possession to many of their ancestral lands.<sup>3</sup> Recently, however, American Indians have become increasingly active litigants in a variety of contexts.<sup>4</sup> In one set of cases, Indians challenged government development projects on public lands, contending that because the projects interfered with Indian sacred sites, they violated the free exercise clause.<sup>5</sup>

\*772 This Note focuses on the sacred lands cases<sup>6</sup> and argues that courts have improperly transferred conventional free exercise analysis to an unfamiliar setting. As a result, these decisions fail to give adequate consideration to sincere Indian religious interests, and seem to conflict frequently with vital principles underlying the free exercise clause.

The impact of cases such as *Cantwell* on free exercise analysis was unclear, however, since those cases simultaneously involved other important first amendment issues.<sup>11</sup> This problem was alleviated in *Sherbert v. Werner*,<sup>12</sup> where the Court confronted only a free exercise claim.<sup>13</sup>

[T]he Amendment embraces two conceptions, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.<sup>10</sup>

In the 1940s, the Court began to move beyond this belief-action distinction. In *Cantwell v. Connecticut*,<sup>9</sup> a Jehovah's Witnesses was convicted for playing a record attackig organized religions on a busy street corner, without first obtaining official approval. In reversing the conviction, the Court stressed that actions as well as beliefs would now be afforded some manner of free exercise protection, noting that:

In its initial construction of the free exercise clause, the Supreme Court drew a distinction between religious beliefs, which were protected, and religious actions, which were unprotected and therefore subject to extensive government regulation.<sup>7</sup> While Congress was deprived of all legislative power over mere opinion [it] was free to reach actions which were in violation of social duties or subversive of good order.”<sup>8</sup>

#### A. Early Free Exercise Clause Analysis

#### 1. DEVELOPMENT OF FREE EXERCISE CLAUSE ANALYSIS

Part I outlines the development of the Supreme Court's current tripartite approach to free exercise issues. Part II examines the application of this approach to a series of earlier cases in which Indian free exercise claims did not involve sacred sites. Part III analyzes the sacred lands cases and concludes that they are inconsistent with both mainstream free exercise cases and the earlier Indian religious cases. After surveying possible legislative alternatives, Part IV offers recommendations for restructuring current free exercise analysis so that it leads to fairer evaluation of sacred site issues.

Third, the Court inquired into the connection between defendants' practices and their religious beliefs. It found that the Amish regarded their entire way of life, including their mode of education via "learning by doing," as closely related to their beliefs.<sup>31</sup> The Amish protest against formal education beyond the eighth grade was thus based on their "central religious concepts" calling for a life apart from worldly values and influences.<sup>32</sup>

The second threshold criterion mandated that the actions for which defendants sought protection be "rooted in religious belief."<sup>27</sup> The Court contrasted these activities with those such as Thoreau's, which were based on personal and philosophical choice, rather than on religious belief: "A way of life, however virtuous and admirable, may not be imputed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."<sup>28</sup> The Amish way of life, however, was religiously based, and not "merely a matter of personal preference."<sup>29</sup> Indeed, the Court stressed that the Amish daily life and religious practices were derived from written scripture, and had been followed for nearly three hundred years by an organized community.<sup>30</sup>

Before reaching the two-step analysis developed in *Sherbert*, however, <sup>31</sup>75 the Court established several threshold criteria which defendants had to satisfy in order to state a free exercise claim. First, defendants were required to demonstrate that they sincerely followed a recognizable "religion."<sup>32</sup> Since the parties previously stipulated to the sincerity of the Amish religious beliefs, this inquiry was not a problem.<sup>26</sup>

Moreover, the Court was unwilling to assess the state interests offered to justify the statute, noting that "Wisconsin v. Yoder"<sup>22</sup> is one of the most significant recent free exercise cases. In *Yoder*, members of the Old Order Amish religion were convicted under a state compulsory school attendance law when they refused to send their children to public school after the eighth grade or to enroll them in an alternative private school.<sup>23</sup> Following its analysis in *Sherbert*, the Court affirmed the state supreme court's reversal of the conviction on free exercise grounds.<sup>24</sup>

The Court found that appellant satisfied both steps of the analysis. The state argued that since the employment statute did not explicitly compel appellant to work on Saturday, it placed only an indirect burden on her religious practices. The Court held, however, that any distinction between "direct" or "indirect" burdens was insufficient to show that persons would begin religion work in order to collect compensation. State concerns with avoiding fraud and the disruption of schedules were not the sort of "paramount interests" required to override appellants' religious interest.<sup>25</sup> The state also failed to demonstrate that there were no less restrictive means for attaining its goals.<sup>26</sup>

Moreover, the Court was unwilling to serve its interests without impairing claimants' free exercise rights.<sup>18</sup> The less restrictive means which might serve its interests without impairing claimants' free exercise rights,<sup>19</sup> one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.<sup>20</sup>

The Court found that appellant satisfied both steps of the analysis. The state had to show that there were no that outweighed the impaired free exercise rights.<sup>17</sup> Furthermore, the state had to show that there were no less restrictive means which might serve its interests without impairing claimants' free exercise rights.<sup>18</sup>

The application of Orders' threshold criteria<sup>41</sup> to Indian free exercise cases has proven problematic. For example, courts have found that the requirement that the claimant prove the sincerity of his or her beliefs creates a difficult tension. While this inquiry serves to strain out frivolous claims in which parties seek "to wear the mantle of religious immunity merely as a cloak for illegal activities,"<sup>42</sup> a court that probes too deeply into the parties' sincerity might violate the established principle that the judiciary should not attempt definitions of orthodoxy.<sup>43</sup>

Yoder's Threshold Criteria

Free exercise claims asserted by American Indians in other settings have arisen from such matters as the unlawful taking and transportation of moose,<sup>37</sup> a prisoner wearing his hair in a traditional Indian style,<sup>38</sup> and the Native American Church's use of peyote in religious ceremonies.<sup>39</sup> The courts in these earlier cases were among the first to apply the approach developed in *Sherbert* and *Zorder* to issues involving Indian religions, and their analysis provides a useful model for analyzing the sacred site cases.<sup>40</sup> This section focuses on these cases, treatment of key aspects of the free exercise analysis -- the role of threshold criteria, the proper relationship between the centrality inquiry and the burden requirement, and the balancing of the respective interests of Indians and government.

#### II. EARLIER CASES ADDRESSING INDIAN RELIGIOUS CLAIMS

In addition, the asserted state interest in the compulsory education system did not override the burden on defendants' religious practices. While conceding that providing public schools ranked at the "very apex" of state functions,<sup>35</sup> the Court held that the two chief goals of the education system -- preparing persons for political participation and promoting self-reliance -- were just as readily satisfied by the Amish mode of education, so that granting defendants an exemption would not undermine these goals.<sup>36</sup>

Applying this analysis, the Court found that since the compulsory education statute exposed Amish children to worldly influences, attitudes, and goals that contravened their beliefs, and since it inhibited the adolescents' integration into the community, it imposed a severe burden on defendants' religious practices. 34

[T]he order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of \*776 a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. 33

Having completed this series of threshold inquiries the Court then followed the two-step analysis advanced in *Sherbert*, noting that:

As in *Frank*, the defendant's practice in *People v. Woody*<sup>62</sup> presented strong evidence regarding the importance of the religious practices in question. The court noted that the "cornerstone of the peyote religion" was a ceremony referred to as the "meeting."<sup>63</sup> At these ceremonies, "[t]he central event, of course, consists of the use of

houses as the central place of connoisseances, or the way communication was organized among them. In this case, the Athabascans were not

It is sufficient that the practice be deeply rooted in religious belief to bring it within the ambit of the exercise clause and place on the state its burden of justification.<sup>59</sup> Thus, the court's characterization of the exercise as the "centerpiece"<sup>60</sup> or "cornerstone" of the ritual constituted no more than a description of the

the lower court held that Frank had not denied his three exercise privileges. The Supreme Court of Alaska explicitly rejected the notion that only practices which were indispensable to the religion might be afforded protection, noting that "absolute necessity is a standard stricter than that which the law imposes."

The court carefully articulated the scope of its burden inquiry. The lower court had found that while moose

and therefore no information can be obtained from the analysis. 57

and is the equivalent of sacred symbols in other religions.”<sup>56</sup> Given the importance of moose to a ceremony so closely connected to defendants’ beliefs, the court concluded that the game laws’ prohibition constituted a burden on a practice important to Athabaskan beliefs, and it thus proceeded to the balancing part of its

The most important institution in Athabaskan life, and was always performed soon after birth, was the Athabaskan religion dictated that only native foods could be used in the potlatch. Moose was at the apex,<sup>55</sup> of these foods; indeed, "[m]oose is the centerpiece of the most important ritual in Athabaskan life",

Performing its burden analysis, the court noted that the religious practice at issue, a funeral potlatch, was

In Amadasian *v. Tidwell*, that track a house out of season for use in a hunting community, the man charged with violating Alaskan game laws,<sup>52</sup> The Supreme Court of Alaska held that Frank's conduct was protected by the free exercise clause.<sup>53</sup>

Frank v. State,<sup>51</sup> constitutes a noteworthy example of this method of analysis. The defendant in Frank,

<sup>49</sup> The shouldered joint venture unit had a preference was entitled to the dividends, earnings, cash and funds generated as that practice satisfied *Yoder's* burden requirement.<sup>49</sup> The courts recognized, however, that terms such as “central” were susceptible to shades of meaning,<sup>50</sup> which should not divert the court from its primary

between the Indians' practices and their religious beliefs,<sup>48</sup> and reasoned that those practices which were closely related to beliefs were most worthy of free exercise protection. This analysis was expressed by the scholars and professors who at a "Central" to the Indians' beliefs, then implications of

<sup>14</sup> See also *Central Government's funding of local government*, para 1.1.

#### \*778 B. The Centrality Inquiry and the Burden Requirement

satisfied by the Indian defendants in *Wood*, and has proven similarly easy to meet for Indians in many other cases.<sup>47</sup>

of the bona fides of the belief and does not intrude into the religious issue at all; it does not determine the nature of the belief but the nature of defendants' adherence to it.<sup>46</sup> This good faith standard was easily

Second, in contrast to courts in the sacred site cases, the earlier courts followed closely Yoder's admonition that the availability of less restrictive alternatives be considered in the balancing analysis. In *Teterud v. Burns*,<sup>77</sup> the government argued that a series of interests in penal administration justified a regulation limiting prisoners' hair length. The court rejected that claim, noting that less restrictive alternatives existed. For example, the government's interests in sanitary food preparation and the careful and safe operation of machinery could be served by having prisoners with long hair wear hats; its interest in already identifying the hiding of contraband in long hair could be served through normal searches of the prisoners.<sup>78</sup>

Similarly, in *Wood v. California*, the court commented that California had a very strong interest in enforcing its narcotic laws, and in ensuring that fraudulent claims of religious protection did not undermine those laws.<sup>74</sup> Yet these important state interests also had to yield to the Indian defendants' sincerely held religious claims.<sup>75</sup> This singling out of Indians for special protection creates a striking contrast to the \*782 sacred site cases, where most of the courts denied Indian religious claims without even considering the merit of the state interests involved.<sup>76</sup> ↗ *Last of the Game* -

First, the courts recognized that under Sherrbert and Yoder only a "compelling state interest" could override an individual's free exercise rights.<sup>71</sup> This high standard meant that many important state interests might nevertheless have to yield to Indian religious claims. For example, in *Frank*, the court noted that in Alaska there was a "very strong interest underlying hunting restrictions."<sup>72</sup> Yet, the identification of a strong interest in game regulation, and particularly in maintaining the moose population, was not alone dispositive. The case instead turned on the question "whether [that [state] interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue."<sup>73</sup>

A third issue considered by courts in the earlier cases concerned the method of programming the balancing analysis mandated by Schreber and Yoder. Unlike courts in the sacred site cases, these courts \*781 frequently reached the balancing issue,<sup>69</sup> and they established a useful framework for evaluating government interests asserted in support of regulations.<sup>70</sup>

### C. Balancing Indian Religious Interests and Government Interests

As in *Frank*, the *Woody* court did not mistake labels for sensitive analysis. In ascertaining whether the threshold criteria were met (and the balancing test thus triggered), it kept its main focus on the nature of the relationship between the practice and the belief. "The test of constitutionality calls for an examination of the degree of abridgment of religious freedom involved in each case."<sup>67</sup> Terms such as "central" were merely means of illustrating such relationships and did not themselves constitute the test.<sup>68</sup>

peyote in quantities <sup>64</sup> \*780 sufficient to produce an hallucinatory state.”<sup>65</sup> Not only was the use of peyote highly important to such ceremonies, but the Native American Church viewed peyote as itself “an object of religious beliefs. The defendants’ practices were thus closely connected, if not actually intertwined, with their worship.<sup>66</sup> The court concluded that since the regulation prohibited these practices, it placed a burden on them for free exercise purposes.<sup>66</sup>

Not only did the land possess intrinsically sacred qualities, but it also constituted plaintiffs' "connection with the Great Spirit."<sup>92</sup> In addition, the Cherokee felt that the beliefs and knowledge of their ancestors had been passed into the land where they were buried and that current medicine men obtained their powers by communicating with these ancestors.<sup>93</sup> Thus, plaintiffs argued that the TVA's proposed flooding of the land sanctified, and as the religious "birthplace of the Cherokee,"<sup>94</sup> to their religion.<sup>95</sup> The land was the location of the ancient village of Chota, which had served as a capital, argued that land along the Little Tennessee River that would be flooded by the Tellico Reservoir was sacred to them.<sup>96</sup> Plaintiffs enjoin the completion of the Tellico Dam on the Little Tennessee River.<sup>97</sup> Plaintiffs Cherokees and two bands of the Cherokee Nation sought a class action in which they sought to sites and the free exercise clause is *Segoyah v. Tennessee Valley Authority*.<sup>88</sup> In Segoyah, three individual Cherokee Indians and two bands of the Cherokee Nation brought a class action in which they sought to a. Centrality. One of the most influential cases involving the relationship between American Indian sacred sites and the free exercise protection of sacred sites, American Indian plaintiffs

## 2. Burdens on Sites and Practices

In all of the cases where they sought free exercise protection of sacred sites, American Indian plaintiffs readily demonstrated that they followed an actual religion in which they sincerely believed.<sup>89</sup> Similarly, plaintiffs were often able to show that practices performed at the sites were based upon their religious beliefs, as opposed to mere cultural or historical concerns.<sup>90</sup> However, in these cases the courts erroneously transformed Yoders' threshold inquiry regarding the importance or centrality of the claimant's practices to his religious beliefs into the determinative aspect of the burden analysis.

### 1. Yoder's Threshold Criteria

This section of the Note considers judicial application of the Yoder analysis to cases in which American religious practices and beliefs.<sup>91</sup> The courts have generally denied plaintiffs relief. This Note argues that in doing so, they have appealed the Yoder analysis to the context of Indian religions in an inappropriate manner. Specifically, the courts have overstated the role of the threshold centrality inquiry, thus often unfairly denying to Indian plaintiffs the protection afforded by the Sherbert/Yoder balancing test.<sup>92</sup> Moreover, the few courts that have reached the balancing portion of the analysis often have not accorded proper regard to the Indians' religious interests.<sup>93</sup>

#### A. Free Exercise and Indian Sacred Sites

Third, the courts mandated that the asserted state interests be articulated specifically -- vague fears or concerns were insufficient to overrule defendants' free exercise claims. In *Frank v. State*, for example, the state argued that allowing Athabascans to take moose out of season would trigger "widespread civil disobedience,"<sup>79</sup> culminating in a pattern of "poaching and creek robbing,"<sup>80</sup> which necessitated that no exception be granted to Athabascans to take moose out of season. The court rejected this argument completely, holding that "[i]n interests which justify limitations on religious practices must be far more definite than these."<sup>81</sup> In short, courts in the earlier cases uniformly placed far greater emphasis on having the state articulate its interests concretely, with attention to less restrictive alternatives, than do their counterparts in the sacred site cases.<sup>82</sup>

### III. THE SACRED SITE CASES

Peaks. II<sup>2</sup>

Similarly, the Hopis believed that the Peaks were sacred because emissaries of the Creator, termed "Kachinas," resided on them for six months each year. These emissaries provided rainfall and helped sustain \*787 the villages. <sup>110</sup> The Hopis had built many shrines on the Peaks and, like the Navajos, they performed ceremonies and collected sacred objects and herbs there. <sup>111</sup> Palmatulls argued that the proposed expansion of the 77 acre Snow Bowl ski area violated their free exercise rights by diminishing the intrinsic sacredness of the area, insulting their deities, and interfering with their ability to pray and conduct ceremonies on the

Plaintiffs presented three exercise claims similar to those advanced in *Sequoyah*. The Navajos argued that the Peaks possessed intrinsically sacred characteristics. They believed that specific Navajo gods resided on the Peaks, 107 indeed, they considered the mountains themselves as composing the body of a living god, "with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin." 108 In addition, the Navajos performed religious ceremonies and gathered ceremonial objects and herbs on the Peaks. 109

area. 106

\*786 Several courts have applied the centrality standard articulated in *Sequoyah*.<sup>103</sup> For example, in "Wilson v. Block,"<sup>104</sup> the Hopi Indian Tribe, the Navajo Medicine men's Association, and individual Navajos challenged the federal government's decision permitting private interests to expand the government-owned ski facilities located on the San Francisco Peaks.<sup>105</sup> Plaintiffs sought the phased removal of all artificial structures on the peaks, or, at a minimum, an injunction barring further development of the Snow Bowl ski facilities located on the San Francisco Peaks.<sup>106</sup> Plaintiff's removal of the

The majority also questioned whether plaintiffs' activities at the site were based on religious, as opposed to other, concerns. It suggested that plaintiffs sought to protect Chota primarily for historical and cultural reasons, which constituted a mere "personal preference".<sup>99</sup> Lying outside the parameters of the free exercise clause,<sup>100</sup> Under Order, the courts' finding that the practices associated with the site were not "rooted in religious belief",<sup>101</sup> would alone be sufficient to dispose of the case, and the court's application of the centrality standard could thus be viewed as an alternative holding.<sup>102</sup>

reach the balancing part of the *Yoder* test.

The Court of Appeals for the Sixth Circuit affirmed the district court's denial of an injunction. In applying the Yoder analysis to the sacred site context, the Sixth Circuit majority treated the centrality inquiry as the exclusive means of gauging whether *Yoder's* burden requirement had been satisfied. Finding that Plaintiff's affidavit failed to establish the "centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances,"<sup>95</sup> the majority ruled that \*785 the Plaintiff's had "fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (*Yoder*), the cornerstone of their religious observance (*Frank*)," or plays the central role in their religious ceremonies and practices (*Woodley*)."<sup>96</sup> Applying this standard, the majority concluded that since the land was not central to the Cherokee practices, the TVAs flooding of the land did not amount to a constitutional burden on Plaintiff's practices and beliefs.<sup>97</sup> Because it found no burden on Plaintiff's practices, the majority did not

violated their right to free exercise by destroying the sacred and holy character of the area, and denying them the access necessary for pilgrimage and collection of medicines. 94

Plaintiffs introduced numerous affidavits and severals witnesses to establish the site's religious significance. The Lakota asserted that Bear Butte was intrinsically sacred, as it was the place where the tribe "originally met with the Great Spirit." In addition, the region was "the most significant site of Lakota religion." In addition, the region was "the most significant site of Lakota religion." The Lakota performed religious ceremonies, "and the deeply religious "Vision Quest," was performed there. Similarly, the Tisistsistas made pilgrimages to and performed religious ceremonies at \*790 the site. Plaintiffs contend that the

b. Corrective effects. In *Crow v. Gullett*,<sup>126</sup> the court articulated an alternative means of determining whether a burden on claimants' practices and beliefs existed. In *Crow*, traditional chiefs and spiritual leaders of the Lakota Nation challenged the state's construction of roads, bridges, parking lots and similar access facilities at Bear Butte.<sup>127</sup> Plaintiffs sought an injunction halting the construction and removing the removal of artificial structures near the site. 128

Plaintiffs further contended that the centrality standard, as stated in *Seguoyah* and adopted by the court, violated the principle that courts are not to inquire into the orthodoxy of a claimant's religious beliefs or practices. <sup>122</sup> The court countered that the *Seguoyah* standard did not mandate judicial consideration of religious doctrines but "rather focused 'solely upon the importance of the geographic site in question to the practice of the plaintiffs' religion.'"<sup>123</sup> The court reasoned that if the site were central to the practice of the plaintiffs' religion, even if the practice itself was not central to plaintiffs' beliefs,<sup>124</sup> it thus denied this challenge to the centrality standard. <sup>125</sup>

Applying this standard, the court held that plaintiffs had failed to show that the Peaks encompassed by the Snow Bowl was central or indispensable to their religious practices. It noted that plaintiffs would still have free access to the Peaks for collecting herbs and objects, and as in *Sequoyah*, the court concluded that since the Snow Bowl was not central to plaintiffs' practices, impairment of that site did not constitute a burden for free exercise purposes. Since it found no burden on \*788 plaintiffs' beliefs or practices the court did not reach the balancing part of the *Zorder* test and the question whether "such area expansion is a compelling governmental interest." 116

The federal government had created a reservoir behind the Glen Canyon Dam and had subsequently filled it to a high level. The reservoir had, in turn, flooded the sacred canyon located near the Rainbow Bridge. It is to a high level. The reservoir had, in turn, flooded the sacred canyon located near the Rainbow Bridge. 148 Plaintiff's allegation that in flooding this canyon and in creating \*793 a tourist attraction, the government had drowned some of their gods, destroyed the sacred character of the site, and denied them access to the player spots necessary to their ceremonies, thereby violating the free exercise clause. 149

The Rainbow Bridge, a large sandstone arch, was located within the 160 acre Rainbow Bridge National Monument.<sup>144</sup> Plamitiffs regarded the Rainbow Bridge, a nearby prayer spot, spring, and cave as sacred areas, holding "positions of central importance" in their religion.<sup>145</sup> They considered these geological areas, before the area was flooded, plamitiffs performed religious ceremonies near the Bridge, and used formations as the "incarnate forms of Navajo gods," who provided them with rainfall and protection.<sup>146</sup> Moreover, before the area was flooded, plamitiffs conducted other ceremonies near the Bridge, and used water from the spring for conducting other ceremonies.<sup>147</sup>

*Badoni v. Higginson*,<sup>141</sup> was one of the few cases in which a court ruling on sacred site issues reached the balancing part of the *Yoder analysis*.<sup>142</sup> In *Badoni*, individual Navajos, several Navajo medicine \*792 men, and three chapters of the Navajo Nation sought an injunction in connection with the federal government's operation of the Glen Canyon Dam and Reservoir, and its management of the Rainbow Bridge National Monument.<sup>143</sup>

### **3. Balancing Indian Religious Interests Against Government Development Interests**

\*791 The court held, however, that the construction did not have a coercive effect on plaintiffs' religious practices. It stressed that plaintiffs had not sufficiently elaborated how particular Lakota and Tisistisists practices were impeded by building roads and bridges at the foot of the Butte. \*792 Indeed, there was some indication that many Indians themselves did not think that the construction burdened their practices -- the state park manager testified that "numerous Indian religious campers requested that the State provide safer and better access to the ceremonial grounds." <sup>139</sup> Campers also have also employed a coercive effects analysis. However, the standard has not yet gained acceptance. <sup>140</sup>

The district court denied the claims, holding that plaintiffs had failed to establish that the construction placed an improper burden on their free exercise rights.<sup>134</sup> In performing its analysis, however, the court did not use a centrality standard. Rather, it held that to demonstrate a burden on their practices plaintiffs had to "show the coercive effect of the [restriction] as it operates against the practice of their religion." In prior cases this coercive effect standard had been satisfied in two types of situations: where, as in *Zoder*, the government regulation forced practitioners to violate the tenets of their religion,<sup>135</sup> and where, as in *Sherber* and *Thomans*, the government conditioned receipt of public benefits on claimants foregoing their religious practices.<sup>136</sup> The court noted that the Indian plaintiffs might meet the coercive effect standard by showing that their situation was analogous to those in *Zoder* or *Sherber*; alternatively, plaintiffs could satisfy the standard by demonstrating that "their conduct in the course of exercising their beliefs has been unduly restricted."<sup>137</sup>

construction violated their free exercise rights by desecrating the sacred area at the foot of the Butte, and diminishing the "power of the Butte as a ceremonial ground." 133

The district court upheld Plaintiff's free exercise claims, enjoining road construction and timbering in the high country.<sup>164</sup> Although the court reached a different result, its method of applying the *Yoder* analysis did not vary greatly from the approach used by courts in earlier cases.

Plaintiffs asserted that construction of the section of road and the allowance of timber harvesting would violate their free exercise rights in several ways. First, the road would "dissect the high country," diminishing the region's inherent sacredness.<sup>162</sup> In addition to noise arising from the construction and use of the road, its visibility from the peaks would destroy the "pristine visual conditions" necessary for performance of plaintiffs' religious ceremonies. Similarly, intensive harvesting of timber would result in serious visual, aural, and environmental impacts on the high country's salient religious characteristics.<sup>163</sup>

Plaintiffs contended that the entire northeastern corner of the Blue Creek Unit constituted a sacred region known as "high country".<sup>157</sup> Since the early nineteenth century, members of the Yurok, Karok, and Tolowa tribes had performed religious ceremonies in the high country, and they continued to do so.<sup>158</sup> For example, tribal members used "prayer sets" located on the highest mountain peaks of the region to "seek religious guidance or personal power" through "engaging in emotional [and] spiritual exchange with the creator...".<sup>159</sup> Crucial participants in ceremonies such as the White Deerskin and Jump Dances journeyed to the region prior to the ceremony in order to fabricate medicines and to purify themselves. Medicine women visited the high country to obtain "healing power" and to gather important medicines.<sup>160</sup> Plaintiffs emphasized that the efficacy of such ceremonies depended strongly on the maintenance of "the solitude, quietness, \*795 and pristine environment found in the high country."<sup>161</sup>

*Northwest Indian Cemetery Protective Association v. Petersen*<sup>133</sup> was the first case in which American Indian plaintiffs succeeded in obtaining free exercise protection for a sacred site. In *Northwest*, members of the Yakama Nation sued the state of Washington and the U.S. Forest Service to stop the construction of a new road through their sacred site of Mount St. Helens. The Forest Service had decided to build a section of the "G-O" road through the Blue Creek Unit of Six Rivers National Forest, and to adopt a plan permitting timber harvesting in that unit.<sup>134</sup>

B. Recent Developments: Northwest Indian Cemetery Protective Association v. Peterson

Such a reduction would greatly lessen the water available to several states for irrigation, development of natural resources, and municipal and industrial uses.<sup>152</sup> Moreover, the court concluded that since the reservoir had to be maintained at the current level and no other action besides reducing the level could eliminate the alleged infringement, there was no less restrictive manner in which the government could attain its interests.<sup>153</sup> The court's evaluation of the government interest thus seemed to follow the pattern established in *Yoder*.<sup>154</sup>

The Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment in favor of the government. Without addressing the question whether the government's actions infringed on the capacity of Lake Powell at a level that intrudes into the Monument outwreighs plaintiffs' free exercise of religion, the court nevertheless held that "the government's interest in maintaining plamitiffs' reservoirs several states. In order to alleviate the alleged infringement on plaintiffs' capacities, the reservoir's surface level would have to be dropped so far that its storage capacity would be cut in half.<sup>151</sup>

In determining whether the proposed government actions placed a burden on plaintiffs' religious practices, the court relied on *Sequoia's* centrality standard. It noted that the high country comprised the "center of the spiritual world" of the Yurok, Karok, and Tolowa tribes, and that "[n]o other geographic areas or sites hold equivalent religious significance for these tribes." <sup>165</sup> Indeed, maintenance of the region's pristine qualities was "central and indispensable" to the performance of plaintiffs' religious ceremonies. <sup>166</sup> Since use of the high country was central to plaintiffs' religious practices, and the proposed road and timbering interfered with such usage, the government had improperly burdened plaintiffs' free exercise of religion. <sup>167</sup> The court distinguished the results in earlier cases such as *Sequoia* by holding that the current plaintiffs had made a stronger factual showing of centrality than had their counterparts in those cases. <sup>168</sup>

\*796 Turning to the balancing part of its analysis, the court found that the government had failed to demonstrate the compelling interests necessary to justify such an infringement on plaintiffs' free exercise of religion. The extra section of the road would not materially improve access to timber resources existing in the Blue Creek Unit, and thus would not lead to any increase in the number of jobs in the local timber industry. <sup>169</sup> Because the Forest Service was currently able to provide all required services to the high industry, the court held that even if the government could show a substantial need for harvesting more timber in the Blue Creek Unit, it could use "means less restrictive of plaintiffs' First Amendment rights" to satisfy those goals. <sup>170</sup>

Similarly, the court noted that the timber contained in the high country constituted a small portion of all the timber located in the entire Six Rivers National Forest. The harvesting of such timber would not greatly alter supplies; nor would the local industry suffer if it was denied access to the region. Furthermore, the court held that even if the government could show a substantial need for timber in the timber unit in the Blue Creek Unit, it could use "means less restrictive of plaintiffs' First Amendment rights" to satisfy those goals. <sup>171</sup>

The Court of Appeals for the Ninth Circuit affirmed the district court opinion. In a narrowly written decision, the Ninth Circuit approved the district court's reliance on the *Sequoia* centrality standard. Quoting extensively from the district court opinion, the Ninth Circuit held that the district court's findings that there was a burden on plaintiffs' religious practices and that the government's interest did not outweigh this religious interest were not clearly erroneous. <sup>172</sup>

This section of the Note considers several common problems that arise from courts' extension of the *Yoder* centrality standard to determine burdens, as was mandated by *Sequoia*. As an initial matter, the courts unduly exaggerated portions of *Yoder* and the earlier Indian religion cases. For example, while *Yoder* provided that the imprecision of claimants' practices to their religious beliefs was just one threshold issue involved in stating a free exercise claim, <sup>173</sup> courts in cases such as *Sequoia* transformed it into the sole mechanism for determining whether plaintiffs' practices had been burdened, thereby distorting the issue involved in stating a free exercise claim. <sup>174</sup>

As the preceding sections demonstrate, significant analytical problems are engendered by the use of the *Yoder* centrality standard to determine burdens, as was mandated by *Sequoia*. As an initial matter, the courts unduly exaggerated portions of *Yoder* and the earlier Indian religion cases. For example, while *Yoder* provided that the imprecision of claimants' practices to their religious beliefs was just one threshold issue involved in stating a free exercise claim, <sup>173</sup> courts in cases such as *Sequoia* transformed it into the sole mechanism for determining whether plaintiffs' practices had been burdened, thereby distorting the issue involved in stating a free exercise claim. <sup>174</sup>

## 1. Burdens on Sites and Practices

### C. Problems with the Sacred Site Cases

This section of the Note considers several common problems that arise from courts' extension of the *Yoder* analysis to the sacred site context. <sup>175</sup> Part IV then proposes a way of adapting *Yoder* so that these problems are avoided.

In *Sherbert and Yoder*, the Supreme Court set out guidelines for assessing government interests offered to justify disputed regulations. The Court provided that only "compelling state interests" which were "concretely articulated could override claimsants' free exercise rights. Moreover, the government also had to

## 2. Balancing Religious Interests Against Government Development Interests

the Indian religion itself.<sup>186</sup>

Consideration of alternative sites is thus often meaningless unless it is conducted from the perspective of

spiritual energy. They are not merely sites of convenience.<sup>185</sup>

[O]nce a site is chosen by the gods as a place of sacred value, that sacredness continues to reside there for eternity and cannot be annulled (by mere transposition by humans to another location). Sacred places transcend human history and are places of inexhaustible power and

commentator on Indian religions has noted that:  
merely to move one outdoor "church" to another.<sup>189</sup> Yet, this familiar analogy is misleading. One in Judeo-Christian religions than in Indian religions, courts may well view plaintiffs as being required areas in which plaintiffs could perform their ceremonies.<sup>184</sup> Since access to specific sites is far less important Moreover, the use of familiar criteria as a means of evaluating sacred site claims raises a unique problem in sacred site cases. In considering various sacred site claims, courts focused on the availability of alternative

only unworkable, but again seems to violate the principle against judicial determinations of orthodoxy.<sup>183</sup>  
plaintiffs' claims.<sup>182</sup> Evaluating Indian religions solely in terms of their Judeo-Christian counterparts is not religious practice that occurred upon superior seat ice as legitimate doubt contributed to its denial of will probably be denied free exercise protection. For example, the *Tunpua* court's difficulty in perceiving a unless the relationship of site, practice, and belief accord with the Judeo-Christian model, Indian plaintiffs understanding the Indian religions involved in those cases.<sup>181</sup> By contrast, the sacred site cases suggest that religious practices in *Wood* and *Frank* properly used such familiar criteria in explaining and \*798 A second problem with the centrality inquiry is that it prompts judges who are usually educated in Judeo-Christian religions to depend on "familiar criteria" in evaluating qualitatively different Indian

with which those beliefs were held).<sup>179</sup>  
inquired too far into the merits of Navajo beliefs themselves (as opposed to merely examining the similarity the mountain as a whole and not just the Snow Bowl region was sacred, the *Wilson* court may well have site and ceremonies performed thereon to the Cherokee religion.<sup>178</sup> In rejecting plaintiffs' contention that to Cherokee religions practices amounted to a judicial conclusion regarding the relative merit of a given *Sequoyah*, for example, the court's finding that the Little Tennessee Valley was not central or indispensable conflicts with the well established principle prohibiting extensive judicial investigations of orthodoxy.<sup>177</sup> In Moreover, the overextension of judicial inquiries in this area. To begin with, the courts' reliance on the centrality standard often propriety of judicial inquiries in this area. One way to describe these results, and not as the controlling standard for evaluating claimed infringement on religious practices.<sup>176</sup>

language in earlier cases such as *Frank* and *Wood*. Yet those cases used the centrality language as simply one way to describe these results, and not as the controlling standard for evaluating claimed infringement

Despite its protective language, however, the Act has not been a controlling factor in the sacred site cases. Courts treat the Act simply as a congressional recognition of Indians' free exercise rights that does not provide plaintiffs with any independent protections. Thus, "where a traditional free exercise analysis has been applied and either a lack of infringing government or an overriding governmental interest found, courts have

For example, the American Indian Religious Freedom Act<sup>197</sup>, provides that as of 1978 "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonialists and traditional rights." 198 To achieve this goal, the Act requires administrative agencies to reexamine their procedures and policies, and alter them where it is necessary to eliminate government interference with Indian religious practices.<sup>199</sup>

Legislatures and administrative agencies may be as well equipped as courts to resolve conflicts between Indian religious interests and governmental developmental interests, particularly when an issue is raised prior to government construction of the project.<sup>196</sup> Several recent statutes seek to provide Indian sacred sites with some measure of protection from government development.

#### A. Legislative Developments

\*801 IV. RECOMMENDATIONS

Second, courts attempting to determine whether less restrictive means exist are often hampered by the timing of sacred site litigation. If the action is not brought until the government project has been mostly completed, the inquiry is unlikely to uncover truly viable alternative means.<sup>193</sup> This timing problem in part explains the different results reached in *Badoni* and *Northwest*. In *Badoni*, the less restrictive means analysis was performed after the dam and reservoir had been completed, and the demands of the multi-state water storage system made clear that the reservoir would have to be maintained at its existing high level. Since an established project was almost by definition less costly and more efficient than any possible alternative, the court's consideration of less restrictive means was not fruitful.<sup>194</sup> By contrast, in *Northwest* the less restrictive means analysis was performed before the road was built or timbering had commenced, when

First, courts have failed to keep separate their consideration of Indian and government interests. For example, in *Badoni*, the court found that the government's interest in maintaining the reservoir at a high level was compelling even though it had not first decided whether plaintiffs' religious practices had been burdened. This suggests that the court believed that the government's interest was sufficient to override any possible religious interest that plaintiffs might advance. <sup>190</sup> This invocation of a "predetermined overriding governmental interest" <sup>191</sup> ignores the comparative quality of the balancing analysis. <sup>192</sup> By refusing to ascertain whether a burden existed on plaintiffs' practices, and if so, the extent of burden of the government's interest is colored by its simultaneous consideration of the burdened religious practices. By refusing to apply the balancing analysis, the court has shifted the burden of proof onto the plaintiff.

demonstrate that no less restrictive means for achieving its interests existed.<sup>187</sup> This method of analysis was  
accurately and fully applied by the court in *Northwest*.<sup>188</sup> While the other courts that reached the balancing  
stage of the analysis mostly followed Koder's guidelines,<sup>189</sup> their analysis has often been problematic.

\*804 b. *Focusing on actual burdens*. With the centrality inquiry carefully limited, courts could then properly follow Sherrbert and Yoder, and conduct the burden analysis by focusing on actual interferences with claimants' religious practices. For example, in *Sherrbert* the Supreme Court held that by forcing the appellants to choose between following the tenets of their religion and foregoing benefits, or abandoning one of the precepts of her religion to obtain benefits, the state imposed a burden on her free exercise rights.<sup>211</sup> Thus, to satisfy the burden requirement, appellants simply had to demonstrate that the state regulation interfered significantly with the exercise of her religion. She did not have to show that the state action would totally prevent her from practicing her religion.

If the problems arising from the courts' earlier use of the standard are to be avoided entirely, the courts must inquire into centrality from the viewpoint of the Indian religion involved. As one commentator noted, "[i]f the focus is to be one of centrality, it becomes essential that courts inquire into the significance of government actions in the context of the affected religion." 210 This approach is particularly needed here, insofar as Indian religious practices and beliefs are so unfamiliar to judges and lawyers raised in the Judeo-Christian tradition.

The recent case of *United States v. Means*<sup>207</sup> is a good example of this more limited approach. In *Means*, a group of Indians established a religious campsite on public lands located in the Black Hills National Forest. The Forest Service denied the group a special use permit and sought a court order directing them to leave the site.<sup>208</sup> While the district court engaged in a centrality inquiry, it stressed that centrality was just part of, and not determinative of, its analysis.<sup>209</sup>

a. Limiting the centrality inquiry. Proceeding sections demonstrated that courts have often misapplied Yoder's centrality standard in the sacred site cases. The seeming unfairness which has resulted from such misapplication can only be avoided in the future if the centrality inquiry is restored to the limited threshold function initially \*803 outlined in *Yoder*.<sup>206</sup> Instead of controlling the analysis, the centrality inquiry would operate simply as one way for the court to examine the asserted connection between a particular site and plaintiffs' religious practices.

## *2. Burdens on Sites and Practices*

The *Yoder* analysis requires claimants to demonstrate that they sincerely follow an actual religion and that the practices for which they seek protection are based on religion, as opposed to cultural or historical concerns.<sup>202</sup> These threshold criteria should be retained in the sacred lands context. They did not create undue disputes in the cases,<sup>203</sup> and indeed they contributed positively to free exercise analysis. For example, the threshold criteria strain out frivolous actions where parties attempt to use First Amendment claims as a guise to block development they actually oppose for nonreligious reasons.<sup>204</sup> Furthermore, by clearly satisfying these criteria, Indian plaintiffs may well add a measure of legitimacy to their claims.<sup>205</sup>

#### **1. Threshold Criteria Other than Centrality**

#### B. Adapting the Yoder Analyses to Sacred Site Context

\*802 development interests might be alleviated by a strengthening of the Act. 201  
In addition to restructuring the Order analysis, clashes between Indian religious interests and government  
not felt obliged to enforce more than consultation with Indian religious leaders by federal agencies. " 200

a. *Indian religious interests.* In the sacred site cases, plaintiffs have asserted a variety of interferences with the general religious and cultural value of the region.<sup>223</sup> The first amendment mandates that a court consider the severity of such alleged infringement from the perspective of the affected Indian religion.<sup>224</sup> While a judge may personally believe, for example, that the inability to obtain sacred eagle feathers does not particularly frustrate Indian religious practices, he should defer to the plaintiff if they offer sincere character of the site, inhibited practitioners from performing both infrequent and common ceremonies on their free exercise rights; they<sup>\*806</sup> have argued that government activities destroyed the intrinsically holy character of the site, inhibited practitioners from collecting sacred herbs, objects, and medicines, and diminished sacred lands, prevented worshippers from collecting sacred herbs, objects, and medicines, and diminished their free exercise rights.<sup>225</sup> Plaintiffs have asserted a variety of interferences with

make such judgments.<sup>226</sup>

Since Indian religious practitioners and government officials possess vastly and qualitatively different interests regarding sacred lands, it is unhelpful for courts to consider the balancing analysis as a mere "weighing" of rival concerns upon some equivalent "scale."<sup>227</sup> Rather, the court is in essence rendering a value judgment that resolves conflicts over land use in a particular situation. The balancing analysis should primarily serve to guide the court in understanding and comparing the various interests so that it can best characterize of the site, inhibited practitioners from performing both infrequent and common ceremonies on their free exercise rights; they<sup>\*806</sup> have argued that government activities destroyed the intrinsically holy character of the site, inhibited practitioners from collecting sacred herbs, objects, and medicines, and diminished their free exercise rights.<sup>225</sup> Plaintiffs have asserted a variety of interferences with

### 3. Balancing Indian Religious Interests Against Government Development Interests

Indian plaintiffs in sacred site cases would probably be more successful in meeting the practical burden of sacred site cases occupying the courts.<sup>228</sup> Yet, because the standard ultimately depends on a factual, case-by-case inquiry, it would not result in an undue expansion of the number of standards than they have been under the previous approach.<sup>229</sup> Since Indian religious practitioners and government officials possess vastly and qualitatively different interests regarding sacred lands, it is unhelpful for courts to consider the balancing analysis as a mere "weighing" of rival concerns upon some equivalent "scale."<sup>227</sup> Rather, the court is in essence rendering a value judgment that resolves conflicts over land use in a particular situation. The balancing analysis should primarily serve to guide the court in understanding and comparing the various interests so that it can best

applying this formulation, the court held that because the Forest Service regulations restricted "when, where, and how the ceremonies are conducted,"<sup>230</sup> in the Black Hills, they imposed "a significant negative impact" on the Lakota religious practices, which satisfied the burden requirement.<sup>231</sup>

The Supreme Court has not set forth a precise test for determining whether or not a burden upon the exercise of religion that is significant enough to be labeled a burden.<sup>232</sup> To answer this question, a court or agency must take a sensible and realistic look at the facts and circumstances of the case and then decide whether there exists a real negative impact exists. After completing a limited centrality inquiry,<sup>233</sup> the Means court addressed whether the Forest Service

restricions on use of and access to the Black Hills burdened the Lakota Indians' free exercise rights. It noted that:

Court again stressed the practical interference with defendants' free exercise of their religion.<sup>234</sup> Similarly, in Yoder the Court held that since the compulsory education law exposed Amish children to worldly influences, attitudes, and goals that conflicted with their beliefs and impeded the adolescent child's integration into the Amish community, it amounted to a burden on defendants' religious practices.<sup>235</sup> The emphasis on actual burdens on claimants' religious practices could be readily transferred to the sacred site context. The analysis of the district court in *United States v. Means*<sup>236</sup> illustrates this method.

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## Footnotes

<sup>224</sup> Several modifications to conventional free exercise analysis will remedy these problems. Most significantly, once the centrality inquiry is restored to its original limited role, courts will properly be able to focus on actual interferences with religious practices, as they are perceived from the perspective of the Indian religion. They will then be able to compare carefully such interferences with asserted compelling government interests, while paying particular attention to existing less restrictive alternatives. In short, these modifications will be relatively easy for courts to implement, and will ensure fairer and more consistent government interests.

<sup>225</sup> In the development process for evaluation of less restrictive alternatives to be meaningful, courts take into account the different natures of the two sets of interests, and are frequently conducted too late. Moreover, courts' efforts at balancing Indian religious interests and government development interests do not encourage reliance on familiar criteria as standards for measuring sacred site claims. Encourages improper reliance with the principle *sagismiti* (judicial determinations of orthodoxy), the earlier Indian religion cases, conflicts with the principle *sagismiti* (judicial determinations of orthodoxy), harmful to Indian religious concerns. The court's use of centrality exceeds the inquiry required by *Zorder* and analysis to a new and unfamiliar setting. So far such attempts have been incomplete and at times unduly

## \*808 CONCLUSION

<sup>226</sup> Finally, having determined the extent of infringement on plaintiffs' religious practices from the perspective of the Indian religion, and having analyzed the asserted compelling government interests in light of less restrictive alternatives, the court should compare the rival interests where either party's interest, when viewed on its own terms, is so strong that the court must find entirely in favor of the Indians or entirely in favor of the government. The court should focus, however, on achieving measure accommodations of the competing interests, and this focus should inform the court's shaping of appropriate relief.<sup>231</sup>

<sup>227</sup> \*807 Furthermore, Indian plaintiffs should file sacred site claims as rapidly as possible. Early filing will enable the court to focus on the possible existence of less restrictive means for achieving the government's goals without having its analysis skewed by preexisting commitment of substantial government resources to the project.<sup>228</sup> If government agencies learn that courts will employ a strict less restrictive means standard, they may be more likely to consider viable alternatives when they are initially planning the project.<sup>230</sup>

<sup>228</sup> b. *Government development interests*. After analyzing the extent of infringement on plaintiffs' religious practices, the court should address the government interests asserted to justify the development project. Courts should follow the method outlined in *Sherbert* and *Zorder*, which the court in *Northeastern* recently extended to the sacred site context.<sup>227</sup> Pursuant to this method, the government must demonstrate a "compelling interest" in the project. The government simply assert general interests in litigation or economic development -- the need for a particular project at a particular site must be carefully balanced against the asserted interests in litigation.<sup>229</sup>

<sup>229</sup> <sup>226</sup> Valuing a given site for purposes of the balancing analysis.<sup>225</sup> This process allows the Indians themselves to participate in and good faith assertions to the contrary.<sup>225</sup> The court should addressees the government interests asserted to justify the development project.

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| 1  | 708 F.2d 735, 740 n.2 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).<br>See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. Miltosh, 21 U.S. (8 Wheat.) 543 (1823); American Indian Religious Freedom Act, as originally enacted, Pub. L. No. 95-341, 92 Stat. 469 (1978) (current version at 42 U.S.C. § 1996 (1982)); Indian Trade and Mercurousse Act ch. 19, § 8, 1 Stat. 330 (1793).   |
| 2  | 78 U.S. 398 (1963).<br>See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. Miltosh, 21 U.S. (8 Wheat.) 543 (1823); American Indian Religious Freedom Act, as originally enacted, Pub. L. No. 95-341, 92 Stat. 469 (1978) (current version at 42 U.S.C. § 1996 (1982)); Indian Trade and Mercurousse Act ch. 19, § 8, 1 Stat. 330 (1793).   |
| 3  | Sees, e.g., Indian General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388 (current version in scattered sections of 25 U.S.C.); Termination Act, ch. 303 §§ 1-12, 68 Stat. 250-52 (1954) (repealed 1973).   |
| 4  | The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. This Note is restricted to a discussion of the free exercise clause and does not address establishment clause issues raised in a few of the cases.   |
| 5  | See United States v. Means, 627 F. Supp. 247 (D.S.D. 1985); Northwest Indian Cemetery Ass'n. v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983); Northwest Indian Cemetery Ass'n., 107 S. Ct. 1971 (1987); Inupiat Community of the Arctic Slope v. Northwest Indian Cemetery Protective Ass'n., 107 S. Ct. 1971 (1987); Inupiat Community of the Arctic Slope v., United States, 548 F. Supp. 182 (D. Alaska 1982), aff'd, 746 F.2d 570 (9th Cir. 1984), cert. denied, 106 S. Ct. 68 (1985); Crow v. Gulliet, 541 F. Supp. 785 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1984), cert. denied, 106 S. Ct. 64 (1985); Black v. Hopi Indian Tribe, 8 Indian L. Rep. 3073 (D.D.C. 1981), aff'd sub nom. Wilson v. Black, 708 F.2d 735 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984); Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E.D. Tenn. 1979), aff'd, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), aff'd, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). |
| 6  | See Reynolds, 98 U.S. at 164. See generally Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause, 1981 UTAH L. REV. 309, 322; Riga, Yoder and Beyond: The Free Exercise Clause: A Mormon under Polygamy Statute, rejecting defendants' assertion that polygamy was a religious belief protected by the free exercise clause.   |
| 7  | Reynolds, 98 U.S. at 164. See generally Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause, 1981 UTAH L. REV. 309, 322; Riga, Yoder and Beyond: The Free Exercise Clause: A Mormon under Polygamy Statute, rejecting defendants' assertion that polygamy was a religious belief protected by the free exercise clause.   |
| 8  | Pepper, supra note 8, at 327 (arguing that "these cases are too intricately entwined with free speech, assembly considerations to assist significantly in a coherent, independent elaboration of the appropria-  |
| 9  | See Pepper, supra note 8, at 303-04 (footnote omitted). See also Pepper, supra note 8, at 329.   |
| 10 | 310 U.S. 296 (1940).   |
| 11 | See Pepper, supra note 8, at 327 (arguing that "these cases are too intricately entwined with free speech, assembly considerations to assist significantly in a coherent, independent elaboration of the appropria-  |
| 12 | 374 U.S. 398 (1963).   |
| 13 | Two years before Sherrbert, the Court addressed a distinct free exercise claim in <i>Braunfeld v. Brown</i> , 366 U.S.   |
| 14 | on Saturday challenged the state's Sunday closing law. They argued that the law infringed on their free exercise rights, since forcing them to close on both Saturday and Sunday placed them at a financial disadvantage compared with their fellow merchants. The Court rejected the claim, stressing that the burden on religious practices was "imdirect," 366 U.S. at 605-09. This indirect/direct analysis, however, seems to have been overruled by Sherrbert. See text at note 19 infra.  |
| 15 | 374 U.S. 398 (1963).   |

- 374 U.S. at 403. See also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1058-59 (2d ed. 1983).  
 17 374 U.S. at 406.  
 18 374 U.S. at 407.  
 19 374 U.S. at 404. The Court analogized this conditioning of benefits on violating one's religious faith to the imposition of a fine on appellants for her Saturday worship. 374 U.S. at 404.  
 20 374 U.S. at 407.  
 21 374 U.S. at 407-08.  
 22 406 U.S. 205 (1972).  
 23 406 U.S. at 207-08.  
 24 406 U.S. at 234.  
 25 406 U.S. at 235. The Court has at times struggled with what constitutes a "religion" for purposes of the free exercise clause. See, e.g., Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").  
 26 406 U.S. at 209. Similarly, this criterion is not controversial in the sacred site cases where the parties frequently agree that the Indian religious beliefs asserted are sincerely held. See notes 86-88 *infra* and accompanying text.  
 27 406 U.S. at 215.  
 28 406 U.S. at 215. The Court believed that this personal preference exception was necessary to prevent individuals from asserting their own moral standards as ways of circumventing the law. 406 U.S. at 215-16. Such concerns date back to Reynolds v. United States, 98 U.S. 145, 167 (1878) (an individual could not be allowed to become a "law unto himself").  
 29 406 U.S. at 216.  
 30 406 U.S. at 216-17, 235. Such an analysis would also seem to favor tribal claims derived from long-standing, organized religious practices.  
 31 The Court noted that the Amish lifestyle was "imperable from and a part of the basic tenets of their religion."  
 32 406 U.S. at 210-11. In the sacred site cases, several courts transformed this "centrality" inquiry into the primary means for determining whether claimants' religious practices had been burdened by government development.  
 33 406 U.S. at 214. Moreover, as in *Sherbert*, the state had to demonstrate that its interests could not be served by less restrictive means. 406 U.S. at 235-36.  
 34 406 U.S. at 217-18. Describing this burden on defendants' practices, the Court added that the compulsory school attendance law posed the "very real threat of undermining the Amish community and religious practice as they exist today." 406 U.S. at 218.  
 35 406 U.S. at 213.  
 36 406 U.S. at 221-23. Significantly, the Court evaluated the value of the Amish education system from the practitioners' viewpoint:

The centrally inquiry played an analogous role in *Zorder*. See notes 31-32 *supra* and accompanying text. In the sacred site cases, the courts carried this inquiry to another level. They focused on the relationship between the

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See, e.g., *Teterud v. Burns*, 522 F.2d 357, 361 (8th Cir. 1975) (court based finding of simicety largely on defendant's statement that if he cut his long hair he "would feel spiritually just dead"); *Frank v. State*, 604 P.2d 1068, 1073 (Alaska 1979) (because the trial court found the defendant to be sincere in his beliefs, "[t]he question of simicety required[ ] no extended discussion"); *Wood v. State*, 61 Cal. 2d at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77 ("we encounter no problem as to the bona fide nature of defendants' assertion of the free exercise clause"). But cf. *United States v. Kueh*, 288 F. Supp. 439, 445 (D.D.C. 1968), discussed in Note, *Chemical Sacraments*, 92-31, where the author points out that courts applying a good faith standard to their simicety inquiry will have "considerable evidence" available to aid them. The sincerity inquiry was adequately handled similarly by courts in the sacred site cases. See notes 86-87 infra and accompanying text.

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Clim. App. 1977], 21, 31, 304 P.zd 930, 934 (19/3), cert. denied, 411 U.S. 946 (19/4); Whithorn v. State, 381 P.zd 339, 340 (Okla.

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728, 729, 39 Cal. Rptr. 912, 913 (1964).

61. Chai, Z.; Li, Y.; Wang, S.; Guo, J.; Liu, S.; Chen, L.; Wang, X.; Wang, Y.; Wang, H.; et al. *Environ Pollut*. 2019; 246: 22–31.

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This principle can be traced to the United States Supreme Court's decision in *West v. Birmingham Bd. of Education*, 319 U.S. 624 (1943). See notes 177-79 infra and accompanying text.

*Wood*, 61 Cal. 2d at 276, 394 P.2d at 821, 40 Cal. Rptr. at 77.

Perhaps the most rigorous statement of the threshold criteria occurred in *Frank*, where the court commented that "[t]he free exercise clause may be invoked only where there is a religion involved, only where the conduct in that case" violates "the claimant's religious scruples."

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Several of the sacred site cases referred to these earlier cases, but seem to have misinterpreted their meaning. See notes 175-86 *infra* and accompanying text.

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Some courts have permitted the use of Peyote in Indian religious ceremonies. See Native Am. Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), aff'd mem., 633 F.2d 205 (2d Cir. 1980); State v. Whitmingsham, 19 Ariz. App. 27, 504 P.2d 950 (1973), cert. denied, 417 U.S. 946 (1974); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); In re Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964); Whithorn v. State, 561 P.2d 539 (Okla. Crim. App. 1977); but see State v. Soto, 21 Or. App. 794, 537 P.2d 142 (1975) (prohibiting use of Peyote), cert. denied, 424 U.S. 955 (1976). See generally Comment, *Braue New World Revisited: Fifteen Years of Chemical Sacraments*, 1980 WIS. L. REV. 879 [hereinafter Note, "Chemical Sacraments"].

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Teterev V., Burns S. 22 F.2d 357 (8th Cir. 1975).

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<sup>1</sup>Frank v. State, 604 P.2d 1068 (Alaska 1979).

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<sup>406</sup> U.S., at 222. Part IV of this Note argues that a similar perspective is required for proper consideration of the

"It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for

- site and practice, rather than the relationship between the practice and beliefs. Such an analysis assumed that the site and practice had only a derivative value for purposes of the free exercise clause -- land was to be protected, land in question had a direct connection to beliefs, which alone would warrant free exercise protection. Courts in the sacred site cases, however, did not treat the centrality inquiry merely as a threshold issue in a free exercise claim, but instead transformed the inquiry into the controlling factor in determining whether claimants' practices were burdened. See notes 174-86 *infra* and accompanying text.
- See, e.g., THE RANDOM HOUSE COLLEGE DICTIONARY 218 (rev. ed. 1975) which states nine different definitions of "central," one of which is "principal; chief; dominant."
- 604 P.2d at 1068 (Alaska 1979).
- 604 P.2d at 1068-69.
- 604 P.2d at 1070.
- 604 P.2d at 1071.
- 604 P.2d at 1072.
- 604 P.2d at 1073.
- 604 P.2d at 1073. See notes 70-73 *infra* and accompanying text for discussion of the manner in which the court performed the balancing analysis.
- 604 P.2d at 1073. Similarly, in *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975), the court held that a prison regulation prohibiting the defendant, a Cree Indian, from wearing long braided hair violated the free exercise clause. In the course of its *Yoder* analysis, the court found that wearing long braided hair was a "tenant of the Indian religion." 522 F.2d at 359. As in *Frank*, the court specifically rejected the notion that defendant had to show that wearing long braided hair was "an absolute tenet of the Indian religion practiced by all Indians." 522 F.2d at 360. See also Note, *Cheematic Sacraments*, *supra* note 39, at 927-28, (stressing that the *Teterud* decision did not require any proof of "centrality" of the practice to the Cree beliefs).
- 604 P.2d at 1071. This analysis parallels *Yoder*, where the Supreme Court used terms such as "central religious concepts" to illustrate the strong connection existing between claimants' religious practices and beliefs. See notes 31-34 *supra* and accompanying text.
- 604 P.2d at 1073.
- 61 Calif. 2d at 716, 394 P.2d 813, 40 Calif. Rptr. 69 (1964).
- 61 Calif. 2d at 720, 394 P.2d at 817, 40 Calif. Rptr. at 73.
- 61 Calif. 2d at 722, 394 P.2d at 818, 40 Calif. Rptr. at 74.
- 61 Calif. 2d at 721, 394 P.2d at 817, 40 Calif. Rptr. at 73. Indeed, the court stated that peyote was so important to defendants' religion that "[i]t is forbidden the use of peyote is to remove the theological heart of Peyotism." 61 Calif. 2d at 722, 394 P.2d at 818, 40 Calif. Rptr. at 74.
- 61 Calif. 2d at 721, 394 P.2d at 817, 40 Calif. Rptr. at 73. The notion that the Navajos' use of peyote warranted protection in part because of its intrinsic sacredness provides an interesting parallel for the sacred site cases.
- It might be argued that intrinsic characteristics of the sites themselves may call for their protection, regardless of the quantity of practices carried on at those sites. *See generally* Native Am. Church of New York v. United States, 468 F. Supp. 1247, 1249-51 (S.D.N.Y. 1979), aff'd mem., 633 F.2d 205 (2d Cir. 1980).
- 61 Calif. 2d at 721, 394 P.2d at 817, 40 Calif. Rptr. at 73. The notion that the Navajos' use of peyote warranted protection in part because of its intrinsic sacredness provides an interesting parallel for the sacred site cases.
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Significantly, the use of peyote by the Native American Church is the only major exception to the drug laws that state courts and legislatures have recognized. New Mexico, Montana, and Iowa have recognized the exception by statute, while California, Arizona, and Oklahoma have recognized the exception by judicial decision. See *Whitington*, 19 Ariz. App. at 29, 504 P.2d at 952 n.1; Note, *Chemical Sacraments, supra* note 39, at 900-01 nn.11-12. A similar exception to the Federal Controlled Substance Act has been provided by regulation, see 21 C.F.R. § 1307.31 (1986) ("[t]he listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church").

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61 Cal. 2d at 723, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75.

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604 P.2d at 1073 (footnote omitted).

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604 P.2d at 1073.

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(1976). See also Note, *Chemical Sacraments, supra* note 39, at 905 n.130.

(1976). See State v. Soto, 21 Or. App. 794, 797-98, 537 P.2d 142, 143-44 (1975), cert. denied, 424 U.S. 955 requirement. See *State v. Soto*, 21 Or. App. 794, 797-98, 537 P.2d 142, 143-44 (1975), cert. denied, 424 U.S. 955 follow the *Wood*, exception for peyote use seems to be the court's misundertstanding of the "compelling interest" P.2d 539, 554 (Okla. Crim. App. 1977). Indeed, one explanation for the failure of the Oregon Court of Appeals to denied, 417 U.S. 946 (1974); *Wood*, 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74; *Whitehorn v. State*, 561 See, e.g., *Frank*, 604 P.2d at 1070; *State v. Whitingtonham*, 19 Ariz. App. 27, 29, 504 P.2d 950, 952 (1973), cert.

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61 Cal. 2d at 727-28, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78.

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in using peyote once night at a meeting in a desert hogback near Needles, California.

value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotics laws than to carve out of them an exception for a few believers in a strange faith. Yet [the varying] currents of regarding tolerance. In *Wood*, the court concluded:

Much of their treatment of the religious interests involved was discussed previously. See notes 37-68 *supra* and accompanying text. Moreover, some courts perceived Indian religious interests as part of larger social issues

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*Wood*, 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

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Courts in the sacred lands context have, however, made a somewhat misleading use of these earlier cases, burdened analysis. See notes 174-86 *infra* and accompanying text.

court cites *Grady* for this test, and does not require any further showing of "centrality." The religious exercise; and that it was not used in a manner dangerous to the public health, safety or morals." The was being used in connection with a bona fide practice of a religious belief; that it was an integral part of the (1974) (in a prosecution under Arizona law for possession of peyote it is a defense if the parties show that peyote the court question whether peyote was, central to Grady's practices. If peyote was used in connection with the practice of a religious belief, then that, apparently, was enough." Note, *Chemical Sacraments, supra* note 39, at 889-90. Cf. *State v. Whitingtonham*, 19 Ariz. App. 27, 31, 504 P.2d 950, 954 (1973), cert. denied, 417 U.S. 946 2d at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913. As one commentator has noted, "[n]owhere in the opinion did in good faith, he would be entitled to free exercise protection, and remanded on the sincerity question. 61 Cal. guilty to possession of narcotics. He petitioned the court for a writ of habeas corpus, arguing that he had used peyote for religious purposes. The court held that *Wood* meant that if defendants' beliefs were held in connection with bona fide practice of a religious belief." It then concluded that "the state may not prohibit the use of peyote on the same day as *Wood*. In *Grady*, petitioner, a non-Indian "peyote preacher" and "way shouter," pleaded guilty to possession of narcotics. He petitioned the court for a writ of habeas corpus, arguing that he had used peyote for religious purposes. The court held that *Wood* means that "the state may not prohibit the use of peyote on the same day as *Wood*, by *Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), decided by the California Supreme Court

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61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

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- See notes 88-140 *infra* and accompanying text.  
 76 See notes 88-140 *infra* and accompanying text.  
 77 522 F.2d 357 (8th Cir. 1975).  
 78 522 F.2d at 361.  
 79 604 P.2d 1068, 1074 (Alaska 1979).  
 80 604 P.2d at 1074.  
 81 604 P.2d at 1074. The court added that “[U]stifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment.” 604 P.2d at 1074 (quoting Terrell v. Burns, 522 F.2d 357, 361-62 (8th Cir. 1975)); see also Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).  
 82 See notes 88-154 *infra* and accompanying text.  
 83 See note 6 *supra*.  
 84 See notes 90-128, 174-86 *infra* and accompanying text.  
 85 See notes 144-57, 187-95 *infra* and accompanying text.  
 86 See, e.g., Northwest Indian Cemetery Assn. v. Peterson, 764 F.2d 581, 586 (9th Cir. 1985) (“[t]he government does not challenge the sincerity of the Indians’ beliefs nor their religious character”), cert. granted  
 708 sub nom. Lyng v. Northwest Indian Cemetery Protective Assn., 107 S. Ct. 1971 (1987); Wilson v. Block, 708 F.2d 581 (9th Cir. 1985), cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn., 107 S. Ct. 1971 (1987). In contrast, in *Sequoyah*, 620 F.2d at 1163, and Impala Community of the Arctic Slope v. United States, 548 F. Supp. 182, 188-89 (D. Alaska 1982), aff’d, 746 F.2d 570 (9th Cir. 1984), cert. denied, 106 S. Ct. 68 (1985), both courts suggested that some of the Indian plaintiffs advanced cultural and not religious concerns.  
 87 See *Wilson*, 708 F.2d at 740; *Northwest Indian Cemetery*, 565 F. Supp. 586, 594 (N.D. Cal. 1983), modified, 764 F.2d at 1139 (6th Cir.), aff’d, 480 F. Supp. 608 (E.D. Tenn. 1979), cert. denied, 449 U.S. 953 (1980).  
 88 620 F.2d at 1160. For discussion and description of the case, see generally Note, *Native Americans’ Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C. L. Rev. 463, 475-81 (1985)  
 89 620 F.2d at 1160. For discussion and description of the case, see generally Note, *Native Americans’ Access to the Use of Public Lands*, 63 B.U. L. Rev. 141, 143-45, 161-63 (1983) [hereinafter Note, *Native American Free Exercise Rights*]; Note, *Indian Worship v. Government Development: A Breed of Religion Cases*, 1984 UTAH  
 90 620 F.2d at 1160. Plaintiff sought protection for the sacred character of the region itself, in addition to protecting practices they performed there. As one commentator noted, “[t]he Cherokee practice their religion, in part, by worshiping the valley itself; they believe that prayer to and at sacred sites facilitates direct communication with the supernatural world.” Note, *Native American Free Exercise Rights*, *supra* note 89, at 161 (footnote omitted).  
 91 620 F.2d at 1162. One affiant described Chota as “analogous to a Cherokee Jerusalem.” Note, *Native American Indian Religious Freedom*.

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| 93  | 620 F.2d at 1162. The Cherokee made pilgrimages to the site, during which they recounted the legends and events associated with the site so as to preserve and maintain the content of their religion. One anthropologist commented that “[v]isiting Chota is analogous to reading A Christian bible”; thus, attempting to understand the Cherokee religion in the absence of access to sacred sites “would be like attempting to understand the Judiasm or Christianity without the Book of Genesis.” Note, Native American Free Exercise Rights, <i>supra</i> note 89, at 162 n.115.   |
| 94  | 620 F.2d at 1162. Indeed, the court at least partly recognized the special role of the site in Cherokee practices and beliefs, noting that “because of their beliefs respecting the transmission of knowledge and spiritual powers to succeeding generations, particular geographic locations figure more prominently in Indian religion and culture than in those of most other people.” 620 F.2d at 1163.  |
| 95  | 620 F.2d at 1164. The term “central” is susceptible of different shades of meaning. By modifying “central” with the term “indispensable” the court thus made its standard stricter, indicating that only unique sites might even have a chance at some manner of free exercise protection. See note 50 <i>supra</i> and accompanying text.   |
| 96  | 620 F.2d at 1164 (citations omitted).  |
| 97  | 620 F.2d at 1165. Part II of this Note argues that <i>Frank v. State and People v. Wood</i> , do not support such a strict centrality standard.  |
| 98  | 620 F.2d at 1165. This standard defeated the Cherokee claims. It seems that “[t]he centrality requirement might be upheld if affidavits were filed, the case should have been remanded to allow plaintiffs to offer further evidence concerning the connection between the site and their religious practices and beliefs. 620 F.2d at 1165  |
| 99  | 620 F.2d at 1164. This term was initially used by the United States Supreme Court in <i>Yoder</i> to describe personal and philosophical beliefs such as those of Thorstein, which were not protected by the free exercise clause.   |
| 100 | 620 F.2d at 1164-65.   |
| 101 | Yoder, 406 U.S. at 215. See notes 27-30 <i>supra</i> and accompanying text. See also Note, Native American Free Exercise Rights, <i>supra</i> note 89, at 144 n.23.  |
| 102 | Several other factors seem to have driven the <i>Sequoyah</i> courts denial of the Cherokee claims. Since 1966 the federal government had spent \$111,000,000 on the Tellico Dam project. Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, 610, <i>aff’d</i> , 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980). Moreover, in 1979 Congress had directed that the project be completed notwithstanding the provisions of “any other law.” 620 F.2d at 1161. Despite its centrality rhetoric, then, the court may well have engaged in an implicit form of balancing which it determined that the “congressional command” that the project be completed established a compelling government interest. 620 F.2d at 1161. |
| 103 | In addition, the court emphasized plaintiffs’ delay in bringing their claims. Although plaintiffs knew about the project since 1965, this suit had not been filed until “the eve of its [the project’s] completion,” 480 F. Supp. at 610. See also 620 F.2d at 1162. Although the court did not base its holding on any doctrine of respose, such as laches, plaintiffs may well have made it easier for the court to deny them relief. Part IV of this Note discusses the need for American Indian claimants to bring suits seeking to protect sacred sites as quickly as possible. See notes 230-31 <i>infra</i> and accompanying text.  |

See, e.g., *Wilson v. Block*, 708 F.2d 735, 743-45 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983); *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), modified, 764 F.2d 581, 585-86 (9th Cir. 1985), cert. granted sub nom. *Lynng v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987); *Imupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), aff'd, 746 F.2d 570 (9th Cir. 1984), cert. denied, 106 S. Ct. 68 (1985). In *Inupiat*, Eskimo plaintiffs sought to quiet title to the area lying from three to sixty-five miles offshore in the Beaufort and Chukchi Seas off the Arctic Ocean. 548 F. Supp. at 184-85. Plaintiffs alleged, among other things, that federal government leasing in the region interfered with practice of their religion on the superejacent sea ice. The court rejected their free exercise claims, holding that since plaintiffs failed to show the significance of the region to their religion, they had not satisfied *Zadik's* burden requirement. 548 F. Supp. at 188-89. The court supported this decision by relying on the *Seguoyah* centrality standard. 548 F. Supp. at 189 n.4. See also Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 322, nn.66 & 68, 330-31.

708 F.2d at 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

104 religious, as opposed to other, interests).

708 F.2d at 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

105 708 F.2d at 738. For discussion and description of the case, see generally Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 485-91; Note, *Indian Religious Freedom*, *supra* note 89, at 145, nn.33-34, 1460 n.59; Note, *Indian Worship*, *Government Development*, *supra* note 89, at 322, nn.66 & 68, 330-31.

106 708 F.2d at 740.

107 708 F.2d at 738. For further discussion of Navajo beliefs and their relationship to sites, see notes 141-54 infra and accompanying text.

108 708 F.2d at 738.

109 708 F.2d at 738, 740.

110 708 F.2d at 738. Thus, as in *Seguoyah*, plaintiffs argued that the site itself had sacred qualities, apart from the activities conducted there.

111 708 F.2d at 738.

112 708 F.2d at 740.

113 708 F.2d at 744 (footnote omitted).

114 708 F.2d at 744 n.5. The court's indication that satisfying its strict centrality standard still might not warrant a finding of a burden on free exercise suggests that free exercise protection would be available to few, if any, sites held sacred by American Indians or other groups.

115 708 F.2d at 744. In narrowing its focus solely to the importance of the connection between the Snow Bowl area and plaintiffs' religious practices and beliefs, the court rejected plaintiffs' assertion that "the mountain is a whole, and not just parts thereof, is considered sacred." 708 F.2d at 744. This analysis seems to conflict with the court's earlier attempt to describe carefully the nature of plaintiffs' practices and beliefs. See notes 105-11 *supra* and 708 F.2d at 744. In narrowing its focus solely to the importance of the connection between the Snow Bowl area with the Navajo religion.

- 116 708 F.2d at 745. In another portion of the opinion the court also held that expansion of the ski facilities did not burden plaintiffs' freedom to hold certain beliefs. It rejected plaintiffs' argument that the desecration of the site would force them to modify their religious doctrine, thereby creating a burden on free exercise. 708 F.2d at 740-42.
- 117 374 U.S. 398 (1963). See notes 14-21 *supra* and accompanying text.
- 118 450 U.S. 707 (1981) holding that the board had impermissibly burdened Thomas' free exercise rights by compelling him to choose between the exercise of his rights and an otherwise available public benefit.
- 119 708 F.2d at 743. In *Sherbert and Thomas* the Supreme Court held that the distinction between direct and indirect burdens on religious practices was irrelevant for purposes of free exercise analysis. See notes 18-19 and Wilson, 708 F.2d at 743. In *Sherbert and Thomas* the Supreme Court held that the government attempt to condition benefits on a claimants' decision to follow or forego a religious practice or belief, the court commented that "[t]hose cases did not purport to create a benchmark against which to test all indirect burdens and Wilson, 708 F.2d at 743. This reasoning is misleading since many ministers claim free exercise cases as well as claims." 708 F.2d at 743. This reasoning is misleading since many ministers claim free exercise cases as well as Indian religion cases treat *Sherbert and Thomas*, along with *Woder*, as leading authorities. One commentator has commented that they will be denied government benefits unless they modify their religious affiliation, or claimants have alleged that they will be denied government benefits unless they modify their religious practice." Note, *Indian Worship v. Government Development*, *supra* at note 89, at 313 (footnote omitted). See also Note, *Indian Freedom*, *supra* at 1460 n.59 (traditional categories of analysis are "imapplicable to Indian belief, since no benefit in the commonly understood sense of the terms flows from government's leaving sacred sites on public lands undisturbed").
- 120 708 F.2d at 743. The principle against judicial determinations of orthodoxy is considered more fully at notes 177-79 *infra*.
- 121 708 F.2d at 743. This argument is also misleading. Regardless of the scrutiny made of claimants' practices, an inquiry into the importance of a site to those practices may still lead to judicial evaluations of the claimants' orthodoxies.
- 122 708 F.2d at 743. The court also rejected claims based on the American Indian Religious Freedom Act, as originally enacted, Pub. L. No. 95-341, 92 Stat. 469 (1978) (current version at 42 U.S.C. § 1996 (1982)). 708 F.2d at 747. See notes 197-201 *infra* and accompanying text.
- 123 708 F.2d at 743.
- 124 708 F.2d at 743. This argument is also misleading. Regardless of the scrutiny made of claimants' practices, an inquiry into the importance of a site to those practices may still lead to judicial evaluations of the claimants' orthodoxies.
- 125 708 F.2d at 743. The court also rejected claims based on the American Indian Religious Freedom Act, as originally enacted, Pub. L. No. 95-341, 92 Stat. 469 (1978) (current version at 42 U.S.C. § 1996 (1982)). 708 F.2d at 747. See notes 197-201 *infra* and accompanying text.
- 126 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.) (per curiam), cert. denied, 464 U.S. 977 (1983).
- 127 541 F. Supp. at 787-88. Plaintiffs challenged the state's restriction of their access to the Butte during the construction period. 541 F. Supp. at 788, 792. This allegation is considered more fully at note 142 *infra*. Plaintiffs also contend that tourists visiting the Butte violated the sanctity of their pilgrimages and ceremonies. They argue that the state impinged on their free exercise rights by permitting intrusions by the tourists. The court, however, rejected this claim based on an established clause analysis. 541 F. Supp. at 788, 791-92.
- 128 541 F. Supp. at 788. Plaintiffs also sought declaratory relief and damages based on 42 U.S.C. § 1983. For discussion and description of the case, see generally Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 483-85, 490-91; Note, *Indian Worship v. Government Development*, *supra* note 89, at 325-26.

541 F. Supp. at 791. Moreover, the court seemed to be strongly influenced by the states' earlier attempts to accommodate the Indians' religious practices. For example, religious campers had been granted a special area apart from that used by the general public. Religious campers could acquire permits to stay on the Butte longer

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a burden on free exercise.

541 F. Supp. at 791. By focusing on the impairment of specific ceremonies, the court implicitly rejected any argument that the Butte was a whole was sacred and that an infringement of any portion of the site constituted

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of the government regulations).

But cf. Note, *Indian Worship v. Government Development*, *supra* note 89, at 330-31 (arguing that in applying the coercive effect standard, courts such as the one in *Crow* focused too greatly on the intent as opposed to the result to "burden" and concluding that "[e]ven the facts of the case, the finding of the *Crow* Court was reasonable"). Arguing that "in looking for a burden before applying the balancing test, the [Court] court gave a broad reading of the Indian Worship v. Government Development, *supra* note 89, at 490-91 in favor and accompanying text. Cf. Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 173-86 plaintiff's with the difficult task of showing that the site was unique to their religious practices. See notes 173-86 plaintiff's with the difficult task of showing that the site was unique to their religious practices. This contrasts with the centrality standard, which confronts might well be applied so that it focuses on whether plaintiff's performance of their ceremonies at a given site has been interfered with in some obvious manner. Indeed, the coercive effect standard than is the centrality approach used by courts in *Sequoayah* and *Wilson*. Indeed, the coercive effect standard application of the coercive effect standard, it should be noted that this standard is potentially more flexible

541 F. Supp. at 790-91. Although the limited evidence presented in *Crow* may have restricted the courts'

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*Development*, *supra* note 89, at 325.

demarcate "two contexts in which religion cases traditionally have arisen." Note, *Indian Worship v. Government Development*, *supra* note 89, at 325. One commentator has noted that these situations benefits of public welfare legislation" (emphasized in original). One could not exclude members of a religious faith, "because of their faith or lack of it, from receiving the state could not benefit or privilege"); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (holding that the of conditions upon a benefit or privilege); *Amistad* (1963) ("[i]t is too late in the day to doubt that libertines of religion may be infringed by the denial of or placing Amistad lifestyle which is integral to their religious beliefs and practices); *Sherbert v. Verner*, 374 U.S. 398, 404 (1972) (holding compulsory state education impermissibly burdens the Amish method of preparing for the his behavior and to violate his beliefs, a burden upon religion exists."); *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 because of conduct mandated by religious belief; thereby putting substantial pressure on an adherent to modify receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit 541 F. Supp. at 790. See also *Thomas v. Review Bd.*, 450 U.S. 707, 716-18 (1981) ("[W]here the state conditions

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541 F. Supp. at 790 (quoting *School Dist. of Abingdon v. Schempff*, 374 U.S. 203, 223 (1963)).

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541 F. Supp. at 791. The court likewise denied the remainder of plaintiff's claims on various grounds, granting summary judgment in favor of the defendants. 541 F. Supp. at 794.

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541 F. Supp. at 788, 791. The Vision Quester fasted, climbed to a solitary point on the Butte, sang aloud, and prayed to the Great Spirit. 541 F. Supp. at 788. See also Note, *Indian Religious Freedom*, *supra* note 89, at 1456 n.41 (during the ceremony, the practitioner fasted, climbed to a solitary point on the Butte, sang aloud, and prayed to the Great Spirit, the practitioner fasted, climbed to a solitary point on the Butte, sang aloud, and prayed to the Vision Quester). The Vision Quester received "an all-important vision from a personal guardian spirit. This vision will guide the recipient throughout his or her life, and is often an essential part of the transition from youth to adulthood").

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541 F. Supp. at 788. The Vision Quester was "one of the seven sacred ceremonies of the Lakota people." During claims made in *Sequoayah* and *Wilson*. See notes 90-91 and 107-08 *supra* and accompanying text.

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541 F. Supp. at 788. This assertion that the site was intrinsically sacred and holy in character was analogous to

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638 F.2d at 177. The Navajos' belief that living gods inhabited such natural objects may have stemmed from the fact that several of the canyons' rock formations resemble human beings with Native American, fractal characteristics." Note, *Native American Free Exercise Rights*, supra note 89, at 160 n.103. In addition, the Navajo believed that the Rainbow Bridge itself was inhabited by two gods, one male, one female, who had transformed themselves into stone after aiding two Navajo children in moving the land of the gods across the canyon to the land of humans. Navajos called the mountain near the Rainbow Bridge "Head of Earth," and regarded it as the earth god's crown. Similarly, gods known as Water People lived in rivers, springs, rainbows and serpents, and collaborated to provide the Navajos with rainfall. Id. at 160 n.105-09, which also discusses K. LUCKERT, NAVAJO MOUNTAIN AND RAINBOW BRIDGE RELIGION (1977).

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638 F.2d at 177.

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Baddon, 638 F.2d at 175-76. In addition to their free exercise claim, plaintiffs sought relief under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-35 (1982), alleging that the government had continued operating the dam and reservoir without providing the required environmental impact statement. For further discussion and description of the case see generally, Note, *Native Americans' Access to Religious Sites*, *supra* note 89, at 481-83; Note, *Native American Free Exercise Rights*, *supra* note 89, at 431-32; Note, *Indian Religious Freedom*, *supra* note 89, at 145-46, 159-60; Note, *Indian Worship*, 91, *Government Development*, *supra* note 89, at 331-32; Note, *Indian Religious Freedom*, *supra* note 89, at 145-56.

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to public safety and the environment, 341 F. Supp. at 792; yet, prior to considering the strength of the state's interest, the court had already suggested that the overwhelming closing of the site did not place any burden on plaintiff's religious practices because no person had ever been denied access for religious purposes. 341 F. Supp. at 792. The court's subsequent balancing thus did not seem to follow the comparative pattern envisions by Yoder. See also *Baldoni*, discussed at note 140 *supra*.

See also NorthWest Indian Cemetery Protective Assn. v. Petersen, 565 F. Supp. 586 (N.D. Cal., 1983), modified, 764 F.2d 581 (9th Cir., 1985), cert. granted sub nom. Lyng v. Northwest Indian Cemetery Protective Assn., 107 S. Ct. 1971 (1987), discuss at notes 155-72 infra and accompanying text; Crow v. Gullel, 541 F. Supp. 785 (D.S.D., 1982), aff'd, 706 F.2d 856 (8th Cir.) (per curiam), cert. denied, 464 U.S. 977 (1983). One of Plaintiff's claims in Crow was that the state had burdened their religious practices by closing the Butte area for overnight camping during the period of construction of the access road and parking lot. In rejecting this claim the district court relied on a type of balancing analysis. It held that the state had a "compelling interest" in finishing the projects, based on administrative and environmental concerns. In addition, the court noted that closing the site temporarily during construction was a "least restrictive means" of completing the project quickly and with minimal damage.

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See, e.g., *Baldoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), aff'd, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). As in *Crow*, the appellate court in *Baldoni* articulated a coercive effect standard based on language in School Dist. of Abingdon v. Schempff, 374 U.S. 203 (1963). Since the Tenth Circuit reached the balancing part of its analysis without deciding whether government action had infringed on plaintiffs' free exercise rights, it did not have occasion to apply further its coercive effect standard. 638 F.2d at 177 n.4. See

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than other campers, and they did not have to follow any established platforms or trails at the site. 34 F. Supp. at 794.

- 147 638 F.2d at 177. In one such ceremony, the Navajos requested rain by "taking water from a sacred spring located in the canyon floor of the Canyon. These Rock People heard every word spoken in their vicinity and in turn informed the Navajos when ceremonies ought to be performed. Note, *Native American Free Exercise Rights, supra note 89, at 145 n.30 and 160 n.106.*
- 148 638 F.2d at 175-77. The court noted that "[b]ecause of the operation of the Dam and Lake Powell [the reservoir], the springs and prayer spot are under water." 638 F.2d at 177.
- 149 638 F.2d at 176-77. One of the drowned gods was Talking Rock, a collection of eight Rock People who lived on the floor of the Canyon. These Rock People deposited it in another spring located on the top of Head of Earth."
- 150 638 F.2d at 177 & n.4. The court explicitly rested its decision on the balancing analysis, rejecting the lower court's finding that plaintiffs' lack of a property interest in the Monument barred relief. It stressed that the "government must manage its property in a manner that does not offend the Constitution." 638 F.2d at 176. See also Sedouah v. Tennessee Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979), aff'd, 620 F.2d 1159, 1164 (6th Cir.) (plaintiffs issue is also discussed in Note, *Indian Worship v. Government Development, supra note 89, at 331-32.*
- 151 638 F.2d at 177. For background concerning the Glen Dam and Reservoir project, see Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171 (1974).
- 152 638 F.2d at 177. See also Note, *Native Americans' Access to Religious Sites, supra note 89, at 483 ("The Baudot court projected government interests it perceived as compelling because of the impact of the project on large numbers of Americans").*
- 153 638 F.2d at 177. The court's analysis illustrates problems with permitting a less restrictive means inquiry after the challenged project has been substantially completed. See notes 193-95 infra and accompanying text.
- 154 635 F.2d at 175-77. See notes 33-36 *supra* and accompanying text. In short, the court held that the government had a "compelling interest" in water storage and power generation, such interest had been specifically articulated, and no less restrictive alternatives existed. Yet, the court's holding that the government's interest was compelling even though it had not explicitly decided whether plaintiffs' practices had been burdened, suggests that it was not applying the *Koale* balancing analysis in a truly comparative manner. See notes 190-92 *infra* and accompanying text.
- 155 565 F. Supp. at 591. Plaintiffs also based their action on a variety of other statutes, including the American Northwest Indian Cemetery Protective Assn., 107 S. Ct. 1971 (1987).
- 156 565 F. Supp. at 59-91. Plaintiffs also based their action on a variety of other statutes, including the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996. See notes 197-201 *infra* and accompanying text.
- 157 565 F. Supp. at 591.
- 158 565 F. Supp. at 591. Available evidence indicated that approximately 110-140 tribal members used the high country for religious purposes. The number of users was difficult to estimate because some of the ceremonial could only be carried out secretly. 565 F. Supp. at 591 n.3. See also Echo-Hawk, *Natural Resource Development on Public Lands: Strategies for Protection of First Amendment Rights*, INDIAN LAW SUPPORT CENTER REP.
- 159 565 F. Supp. at 591. Available evidence indicated that approximately 110-140 tribal members used the high leaders and practitioners).

This principle was stated by the Supreme Court in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion”; *see also Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) (“religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection”); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say that is a religious practice or activity for one group is not religion under the protection of the First Amendment.”)).

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“See notes 48-68 *supra* and accompanying text. *See also Note, Indian Worship v. Government Development, supra* note 89, at 324 (describing how the centrality approach, first used as an attempt to explain the unfamiliar, “hardened into an ironclad requirement”).

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*See Note, Indian Freedom, supra* note 89, at 1463 (pointing out the “methodological gap between standard free exercise analysis and Indian site-specific religious belief”); is especially inappropriate since “[n]one of the major non-Indian religion cases have mentioned centrality”; is especially inappropriate since “[n]one of the major non-Indian religion cases have mentioned centrality”; is especially inappropriate since “[n]one of the major non-Indian religion cases have mentioned centrality”;

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*See Note, Indian Worship v. Government Development, supra* note 89, at 329 n.119 (arguing that the sacred site

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*See notes 24-32 <sup>supra</sup> and accompanying text.*

*See Note, Indian Worship v. Government Development, supra* note 89, at 329 n.119 (arguing that the sacred site besides the centrality inquiry. *See notes 86-90 <sup>supra</sup>*.

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Since this section of the Note focuses only on problem areas, it omits discussion of *Yoder's* threshold criteria

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764 F.2d 581, 586-87 (9th Cir. 1985). The Supreme Court has recently granted certiorari in this case, 107 S. Ct. 1971 (1987).

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565 F. Supp. at 596-97.

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565 F. Supp. at 596.

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565 F. Supp. at 595-96.

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565 F. Supp. at 595.

where the court rejected the assertion that the region as a whole was sacred); *see also* note 121 *supra*. 565 F. Supp. at 594-95. Critical to the court's finding of a burden on plaintiffs' religious practices was its acknowledgement that “[t]he religious integrity of the high country rests on the pristine qualities of the entire area rather than on just a few individual sites.” 565 F. Supp. at 592 n.6. Moreover, even the Forest Service conceded that “[i]ntrusions on the sanctity of the Blue Creek high country are potentially destructive of the very core of Northwest Indian religious beliefs and practices.” 565 F. Supp. at 595. Cf. *Wilson v. Block*, 708 F.2d at 744-45 (*Indian* religious beliefs and practices); 565 F. Supp. at 595. Of course, the very core of the entire area rather than on just a few individual sites.” 565 F. Supp. at 592 n.6. Moreover, even the Forest Service conceded that “[i]ntrusions on the sanctity of the Blue Creek high country are potentially destructive of the very core of Northwest Indian religious beliefs and practices.” 565 F. Supp. at 595. Cf. *Wilson v. Block*, 708 F.2d at 744-45 (*Indian* religious beliefs and practices); 565 F. Supp. at 595. Of course, the very core of the entire area

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565 F. Supp. at 594. Thus, the court seemed to recognize the intrinsic sacredness of the region.

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565 F. Supp. at 594.

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565 F. Supp. at 596-97, 606.

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565 F. Supp. at 592 & n.6.

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565 F. Supp. at 592.

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565 F. Supp. at 591.

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565 F. Supp. at 591-92. Unlike Western philosophies and religions, which generally perceive power in relational terms, the Indian practitioner seemed to regard power as a tangible substance which could be obtained and subsequently channeled toward healing.

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565 F. Supp. at 591.

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S. Ct. 1971 (1987); see notes 169-72 *supra* and accompanying text.

Northeastern Indian Cemetery Protective Assn., v. Petersen, 363 F. Supp. 386, 594-9 (N.D. Cal. 1983); modif'd, 764 F.2d 381 (9th Cir. 1985), cert. granted sub nom. Lyng v. Northeastern Indian Cemetery Protective Assn., 107

<sup>36</sup> See notes 16-18 & 36 *supra* and accompanying text.

Part IV of this Note argues that courts should evaluate the strength of Indian claimants' religious interests from the viewpoint of the religion involved. (emphasis added).

D. Carrasco, Sacred Space and Religious Vision in World Religions: A Context to Understand the Religious Claims of the Kooteenai Indians, 11 (*unpublished manuscript*, attained from Native American Rights Fund)

*Supra* and accompanying text.

*See Note, Indian Religious Freedom, supra note 89, at 146* (the centrality inquiry promotes a narrowing of the scope of free exercise protection to familiar and well-documented religious tenets, despite the Supreme Court's statement that the First Amendment knows no orthodoxy") (footnote omitted).

See note 103 *supra* and accompanying text. This problem is further illustrated by an exchange in the district court opinion in *Badami v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). Questioning the relationship between the Rainbow Bridge Monument and plaintiffs' religious practices, the district court noted that a small number of individuals had carried out numerous religious ceremonies in the area. Plaintiffs countered that Navajo ceremonies "are not periodic ceremonies [but] are performed when needed, and requested by an individual or family." 455 F. Supp. at 646. Despite this contention, the district court held that the small number of ceremonies performed in the region justified the denial of plaintiffs' claims. Its reliance on familiar patterns of church attendance made the court insensitive to plaintiffs' arguments.

<sup>14</sup> note 89, at 324.

See notes 48-68 *supra* and accompanying text. One commentator points out that in *Wood v. the court* "referred to Peyote would violate the Indians' free exercise rights" and yet felt this "attempt to explain the unfamiliar hardened mentality to explain how that unfamiliar practice fit into an unfamiliar religion, and why prohibiting the use of Peyote an ironclad requirement in later Indian cases." Note, *Indian Worship v. Government Development*, *supra*

<sup>36</sup> See Note, Religious Exemptions, *supra* note 179, at 360 n.60 (“[a]mong the dangers inherent in [relinquishing] theistic beliefs in determining their religious character.”).

See notes 103-25 *supra* and accompanying text. Moreover, even if courts attempted to use centrality to evaluate the bona fides of claimants, religious practices and beliefs, it is not clear that they would be institutionally capable of doing so. See Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 360 n.60 (1980) [hereinafter Note, *Religious Exemptions*] (commenting that identifying the "essence of [a] particular religion [is] difficult even for theologians; religions have survived loss of even apparently fundamental features" (citing M. KONVITZ, *RELIGIOUS LIBERTY AND CONSCIENCE* 77-79 (1968))).

<sup>161</sup> See notes 88-106 *supra* and accompanying text. Cf. Note, *Indian Religious Freedom*, *supra* note 89, at 1461 (warning that the centrality inquiry in these cases has impermissibly "evolved into an examination of the doctrinal pedigree of a religious belief").

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| 198 | Two other cases where courts reached the balancing stage of the <i>Yoder</i> analysis were <i>Crow v. Gulliet</i> , 541 F. Supp. 785 (D.S.D. 1982), aff'd, 706 F.2d 856 (8th Cir. 1982), and <i>Badoni v. Higginson</i> , 455 F. Supp. 785 (D.Utah 1977), aff'd, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). See Note, <i>Native American Free Exercise Rights</i> , <i>supra</i> note 89, at 174 (the <i>Badoni</i> court "merely assumed that the Glen Canyon project as implemented justified an abridgement of religious rights. However, without analyzing the nature and content of Navajo interests, this court could not have compared the importance of these interests with the costs of adopting alternative means"). The balancing analysis performed by the court in <i>Crow</i> was also completed by the court's failure to engage in the balancing required by <i>Yoder</i> . See note 142 <i>supra</i> .  |
| 199 | One commentator points out that "analyzing alternatives after the government expands substantial resources exaggersates, for first amendment purposes, the government's interest in building a project on sacred lands. The government will automatically satisfy its burden of proof whenever the controversy involves a substantially completed project." Note, <i>Native American Free Exercise Rights</i> , <i>supra</i> note 89, at 176. Part IV of the Note complements this argument by suggesting that government accommodation would have meant both a complete development at every stage of the development except for final completion of the project. See note 230 <i>infra</i> and U.S. 954 (1981), see notes 141-62 <i>supra</i> and accompanying text; see also Note, <i>Indian Worship v. Government Badoni v. Higginson</i> , 455 F. Supp. 641 (D. Utah 1977), aff'd, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). See Note, <i>Native American Free Exercise Rights</i> , <i>supra</i> note 89, at 174 (the <i>Badoni</i> court "merely assumed that the Glen Canyon project as implemented justified an abridgement of religious rights. However, without analyzing the nature and content of Navajo interests, this court could not have compared the importance of these interests with the costs of adopting alternative means"). The balancing analysis performed by the court in <i>Crow</i> was also completed by the court's failure to engage in the balancing required by <i>Yoder</i> . See note 142 <i>supra</i> . |
| 200 | See Note, <i>Native American Free Exercise Rights</i> , <i>supra</i> note 89, at 174 (the <i>Badoni</i> court "merely assumed that the Glen Canyon project as implemented justified an abridgement of religious rights. However, without analyzing the nature and content of Navajo interests, this court could not have compared the importance of these interests with the costs of adopting alternative means"). The balancing analysis performed by the court in <i>Crow</i> was also completed by the court's failure to engage in the balancing required by <i>Yoder</i> . See note 142 <i>supra</i> .   |



This section assumes that Indian plaintiffs have already demonstrated an actual interference with their religious practices and the court is evaluating the degree of infringement which exists. See notes 88-172 *supra* and 223

court will still require that the government have a "compelling interest" in the development project. See notes 14-36 *supra* and accompanying text. For example, in comparing the divergent interests the 222

Sherrbet. This view of the balancing process accords with the parameters established by the Supreme Court in *Yoder* and 221

site. This obscures the fact that the court is ultimately making a value judgment. The "scale" metaphor is particularly troubling because it implies that to prevail on an uncertain free exercise 220

claim all Indian plaintiffs need do is "add" another fact to their side by showing another religious use for the 219

means, for example, avoids most floodgate problems. See also Note, *Indian Worship v. Government Development*, 218

despite the fact that in two of the cases [Sequoia and Badoni] plaintiffs became completely unable to reach 217

"despite the fact that in two of the cases [Sequoia and Badoni] plaintiffs became completely unable to reach 216

it is clear that the First Amendment test as developed in this context is a factual test"). Because of the potential 215

for example, the flooding of sacred lands and concomitant denial of access for performance of ceremonies 214

on that practice".

For example, the flooding of sacred lands and concomitant denial of access for performance of ceremonies 213

should accept at "face value [Indian] assertions as to the importance of and infringement 212

determined by the court in *Crow v. Gullie*, 541 F. Supp. 785 (D.S.D. 1982), aff'd, 706 F.2d 856 211

(8th Cir.) (per curiam), cert. denied, 464 U.S. 977 (1983). Cf. notes 126-40 *supra* and accompanying text. See 210

627 F. Supp. at 263. The Means court's practical approach to the burden analysis is analogous to the "corrective 209

effects" standard advanced by the court in *Crow v. Gullie*, 541 F. Supp. 785 (D.S.D. 1982), aff'd, 706 F.2d 856 208

(8th Cir.) (per curiam), cert. denied, 464 U.S. 977 (1983). Cf. notes 126-40 *supra* and accompanying text. See 207

627 F. Supp. at 263. Specifically, the regulations restricted the location of claims, religious campsite, and 206

limited the manner in which their ceremonies were conducted. The Forest Service also imposed a fee for use of 205

the region. 627 F. Supp. at 253-54, 263.

627 F. Supp. at 263. Specifically, the regulations restricted the location of claims, religious campsite, and 204

Having found a burden on defendants' religious practices, the Court proceeded to describe the character of 203

that burden, noting that the compulsory education law posed the "very real threat of undermining the Amish 202

community and religious practice as they exist today." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). See note 201

34 *supra* and accompanying text.

See notes 33-34 *supra* and accompanying text.

374 U.S. at 406. See note 19 *supra* and accompanying text.

374 U.S. at 404. The Court added that the regulations interfered with "cardinal principles" of appellants' religion, 200

terms".

With Indian religious practices and beliefs regarding sacred lands so that they can address them "on their own 199

*Indian Worship v. Government Development*, *supra* note 89, at 335 (arguing that courts must develop family 198

presiding judge or tier of fact about the unique nature of Indian religion in terms he can understand"); Note, 197

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A strict less restrictive means inquiry may thus prompt the intensive consultation between tribal leaders and government agencies envisioned in the American Indian Religious Freedom Act. See notes 197-201 *supra* and accompanying text. Even partial construction of the project, however, should not preclude some type of less restrictive means analysis. See, e.g., Note, *Native American Free Exercise Rights*, *supra* note 89, at 173-74. The author notes that although at one point substantial funds had been appropriated for the Tellico Dam at issue

archaeological project).

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filling inhibited since platters were not aware of the exact location of Choctaw until after TVA completed an early April, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980), discussed at notes 88-103 *supra* (early measures that might be used to preserve the confidentiality of Indian practices). Cf. *Sequoyah v. Tennessee Religious Practices May Preclude Early Filing of Claims*. See *Echo-Hawk, supra* note 158, at 9 (recommending however, one Indian advocate has noted that the intent of worshippers in maintaining the secrecy of their objectives on the remaining 1.5 million acres of the Black Hills).

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Service had targeted the area for other projects, the court concluded that the Forest Service could attain its varied responsibilities had constructed any permanent structures at the 800 acre religious campsite and before the Forest Service had targeted the area for other projects, the court concluded that the Forest Service could attain its varied objectives in educating the public about the importance of the Black Hills.

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See notes 193-95 *supra* and accompanying text. For example, in *Northeast*, because the suit was filed before the

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and limiting the regions where timbering could be carried out. See notes 155-72 *supra* and accompanying text. Projects were commenced, the court could consider protecting the high country by altering the roads' direction or roads may in certain circumstances amount to compelling interests, the expansion of a ski lodge, however, it is justified, cannot constitute such an interest. Compare *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980), *Baldoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981), and *Northwest Indian Cemetery Protective Assn. v. Peterson*, 764 F.2d 581 (9th Cir. 1985), cert. granted sub nom. *Lynge v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987), with *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), and notes 88-172 *supra* and accompanying text. They could support such a position by focusing on the *Xoder Courts*' strong emphasis on the special character of the states' interest in education. See note 36 *supra* and accompanying text.

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See notes 187-89 *supra* and accompanying text. Courts could develop categories of interests that have the potential for qualifying as "compelling." They could thus find that while the construction of dams, water projects,

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565 F. Supp. 586, 595-97; see notes 174-76, 188 *supra* and accompanying text.

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them from building any permanent structures in the region). In the majority of the cases, however, the religion may well permit some form of compromise with governmental development. See the discussion of *Northwest* at notes 155-72 *supra* (addressing the possibility of fashioning alternative which granted them exclusive religious use of only 800 acres within the Black Hills and precluded "protective zones"); see also *Meads*, 627 F. Supp. at 259, 264 (religious practitioners willing to accept an alternative which grants them exclusive religious use of only 800 acres within the Black Hills and precluded "protective zones"). See the discussion of *Northwest* at notes 155-72 *supra* (addressing the possibility of fashioning alternative which grants them exclusive religious use of only 800 acres within the Black Hills and precluded "protective zones").

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Viewed from the perspective of the Indian religion, the infringements may be of such severity that few, if any, accommodations to development are possible. For example, platters might assert that an entire region and not just part of it was highly important to their religious practices and could not be disturbed. Compare *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983), and notes 103-26 *supra*, with *Northwest Indian Cemetery Protective Assn. v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), modified, 764 F.2d 581 (9th Cir. 1985), cert. granted sub nom. *Lynge v. Northwest Indian Cemetery Protective Assn.*, 107 S. Ct. 1971 (1987).

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See United States v. Meads, 627 F. Supp. 247, 254 (D.S.D. 1983) (stressing the importance of taking into account "subjective criteria" of the Indian religion); Note, *Indian Religious Freedom*, *supra* note 89, at 1469 (the balancing analysis should "assess the degree of harm threatened to a traditional Indian religion by proposed development of a sacred site in the context of the tribal religion itself"); Note, *Indian Worship v. Government Development*, *supra* note 89, at 335 (courts should assess Indian religious practices "in their own terms").

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See Part I *supra*

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AMERICAN INDIAN SACRED RELIGIOUS SITES AND... 85 Mich. L. Rev. 771

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been arranged. 627 F. Supp. at 271-72.

Lakota religious practices in the Black Hills, and specified that no appeals could be taken until such relief had 247, 271 (D.S.D. 1985). Instead, the court required the parties to work out an acceptable compromise regarding it was "not in a position to nor does it want to draw the bueprints for a Lakota religious camp." 627 F. Supp.

For example, the *Means* court, considering the appropriate relief for the First Amendment violation, noted that 231

appreciably harmed the government's interest in developing power supplies." *Id.* at 173.

in *Sequoyah*, "legislative history indicate[d] that a decision to forego construction probably would not have

FFY 2016 REPORT

Libby OUE

Drawn from EPA Site/Project code 08BCBD03

Cost Organization C001

FOR THE PERIOD

4/1/2016 thru 09/30/2016

| Object Class Category | FY 2016 - Actual   |                    |                   |               |               |                    |               |                   | FY 2017 - Budget     |                    |                    |
|-----------------------|--------------------|--------------------|-------------------|---------------|---------------|--------------------|---------------|-------------------|----------------------|--------------------|--------------------|
|                       | Personnel          | Fringe Benefits    | Travel            | Equipment     | Supplies      | Contractual        | Construction  | Other             | Total Direct Charges | Indirect Costs     | Total              |
| April-16              | \$3,805.36         | \$1,330.71         | \$594.38          | \$0.00        | \$0.00        | \$4,011.29         | \$0.00        | \$0.00            | \$9,741.74           | \$1,487.89         | \$11,229.63        |
| May-16                | \$3,132.26         | \$1,078.05         | \$543.18          | \$0.00        | \$0.00        | \$0.00             | \$0.00        | \$0.00            | \$4,753.49           | \$1,023.77         | \$5,777.26         |
| Jun-16                | \$9,794.81         | \$3,185.32         | \$3,836.16        | \$0.00        | \$0.00        | \$13,674.59        | \$0.00        | \$474.47          | \$30,965.35          | \$3,795.44         | \$34,760.79        |
| Jul-16                | \$0.00             | \$0.00             | \$0.00            | \$0.00        | \$0.00        | \$0.00             | \$0.00        | \$0.00            | \$0.00               | \$0.00             | \$0.00             |
| Aug-16                | \$8,357.14         | \$3,155.18         | \$808.31          | \$0.00        | \$0.00        | \$5,196.21         | \$0.00        | \$210.55          | \$17,727.39          | \$2,851.24         | \$20,578.63        |
| Sep-16                | \$6,128.20         | \$2,301.67         | \$828.20          | \$0.00        | \$0.00        | \$151.68           | \$0.00        | \$335.84          | \$9,745.59           | \$1,983.63         | \$11,729.22        |
| <b>Total FFY 2016</b> | <b>\$31,217.77</b> | <b>\$11,050.93</b> | <b>\$6,610.23</b> | <b>\$0.00</b> | <b>\$0.00</b> | <b>\$23,033.77</b> | <b>\$0.00</b> | <b>\$1,020.86</b> | <b>\$72,933.56</b>   | <b>\$11,141.97</b> | <b>\$84,075.53</b> |
| Not Drawn**           | \$6,128.20         | \$2,301.67         | \$828.20          | \$0.00        | \$0.00        | \$151.68           | \$0.00        | \$327.15          | \$9,736.90           | \$1,983.63         | \$11,720.53        |
| <b>Drawn FFY 2016</b> | <b>\$25,089.57</b> | <b>\$8,749.26</b>  | <b>\$5,782.03</b> | <b>\$0.00</b> | <b>\$0.00</b> | <b>\$22,882.09</b> | <b>\$0.00</b> | <b>\$693.71</b>   | <b>\$63,196.66</b>   | <b>\$9,153.34</b>  | <b>\$72,355.00</b> |

\*\*September FFY 2016 expenses not drawn until October 2016

Additional expenditure details provided on SABHRS 106 reports